



# Meeting Agenda

## Land Use & Environment Committee

City Hall  
601 4th Avenue E  
Olympia, WA 98501

Information: 360.753.8244

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**Tuesday, February 17, 2026**

**4:00 PM**

**Council Chambers and Online**

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### Special Meeting

Attend: [https://us02web.zoom.us/webinar/register/WN\\_sFsPPEeiRQOatbBZnXmRSQ](https://us02web.zoom.us/webinar/register/WN_sFsPPEeiRQOatbBZnXmRSQ)

1. **CALL TO ORDER**
2. **ROLL CALL**
3. **APPROVAL OF AGENDA**
4. **COMMITTEE BUSINESS**
- 4.A [26-0119](#) Hearing Examiner Candidate Interviews

**Attachments:** [Request for Qualifications](#)  
[Mark Scheibmeir Response to RFQ](#)  
[Phil Olbrechts Response to RFQ](#)

5. **ADJOURNMENT**

*The City of Olympia is committed to the non-discriminatory treatment of all persons in employment and the delivery of services and resources. If you require accommodation for your attendance at the City Council Committee meeting, please contact the Council's Executive Assistant at 360.753.8244 at least 48 hours in advance of the meeting. For hearing impaired, please contact us by dialing the Washington State Relay Service at 7-1-1 or 1.800.833.6384.*



## Land Use & Environment Committee

### Hearing Examiner Candidate Interviews

**Agenda Date:** 2/17/2026  
**Agenda Item Number:** 4.A  
**File Number:**26-0119

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**Type:** discussion **Version:** 1 **Status:** In Committee

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**Title**

Hearing Examiner Candidate Interviews

**Recommended Action**

**Committee Recommendation:**

Not referred to a committee.

**City Manager Recommendation:**

Conduct interviews of candidates for the positions of Hearing Examiner and Pro Tem Hearing Examiner.

**Report**

**Issue:**

Whether to conduct interviews of candidates for the positions of Hearing Examiner and Pro Tem Hearing Examiner.

**Staff Contact:**

Tim Smith, Director, Community Planning and Economic Development, 360.570.3915

**Presenter(s):**

Tim Smith, Director, Community Planning and Economic Development

**Background and Analysis:**

The Land Use and Environment Committee (LUEC) directed staff to move forward with a Request for Qualifications (RFQ) for the services of both Hearing Examiner and Pro Tem Hearing Examiner at their meeting on December 18, 2025. The current Hearing Examiner contract will expire on April 30, 2026. The purpose for having a Pro Tem Hearing Examiner is to ensure land use matters can be heard if the Hearing Examiner has either a schedule conflict or is out due to illness.

The position of Hearing Examiner is established in Olympia Municipal Code (OMC) Chapter 18.82. The purpose of this Chapter, as stated in OMC 18.82.020, is to:

1. Separate the land use regulatory function from the land use planning process.
2. Ensure procedural due process and appearance of fairness in land use regulatory hearings and decisions.
3. Provide an efficient and effective land use regulatory system which integrates the public

- hearing and decision-making processes for land use matters.
4. Provide for consistency and predictability in land use decision making and the application of policies and regulations adopted by the City.
  5. Establish clear and understandable rules governing the land use decision-making process.

The City posted an RFQ (attachment 1) on the City's website in December 2025. The RFQ was published in the Daily Journal of Commerce. The RFQ was also distributed to members of the Hearing Examiner Association of Washington. The City received two responses to the RFQ (attachments 2 - 3). A City staff screening committee reviewed the responses and forwarded both candidates to the LUEC for interviews.

**Climate Analysis:**

This agenda item is not expected to directly result in impacts to greenhouse gas emissions. However, the Hearing Examiner's role in development review services enable energy-efficient construction consistent with the City's Comprehensive Plan policies for more dense patterns of development. This will support increased use of alternative transportation modes that help reduce greenhouse gas emissions.

**Equity Analysis:**

The City strives to provide City services including the development review process equitably to our community members and business communities, as well as the greater Olympia community. This agenda item is not expected to further impact known disparities in our community.

**Neighborhood/Community Interests (if known):**

The work of the Hearing Examiner has been a topic of interest to many community members as development continues throughout the City.

**Financial Impact:**

There is not a direct financial impact related to this RFQ and selection process. The Hearing Examiner contract will continue to provide for the Examiner to be paid on an hourly basis for required hearings. Permit fees are included in OMC 4.40 for staff costs to prepare and conduct Hearing Examiner hearings, and for appeals to the Examiner of administrative decisions.

**Options:**

1. Interview candidates for Hearing Examiner and Pro Tem Hearing Examiner.
2. Do not interview candidates for Hearing Examiner and Pro Tem Hearing Examiner.
3. Defer item to a future meeting.

**Attachments:**

Request for Qualifications  
Mark Scheibmeir Response to RFQ  
Phil Olbrechts Response to RFQ



## Hearing Examiner and Pro Tem Hearing Examiner

### **PURPOSE**

The purpose of this Request for Qualifications (RFQ) is for the City of Olympia (City) to solicit Statements of Qualifications (SOQ) from qualified respondents to serve as the City of Olympia Hearing Examiner, and an additional individual or firm to serve as the Pro Tem Hearing Examiner.

The City of Olympia is committed to being an inclusive, affirming, and equitable place for our community members and staff to live, play, and work. We adhere to the non-discriminatory treatment of all persons in employment and the delivery of services and resources. We strongly encourage submissions from minorities, women, and disadvantaged business enterprises.

**The deadline for submission of Statements of Qualifications is 4:00 pm Pacific Standard Time, Friday, January 30, 2026.** Earlier responses are welcome. **Only electronic submissions will be accepted.**

### **BACKGROUND**

The City seeks to recruit a Hearing Examiner to hear certain land use appeals, development proposals, administrative interpretations/determinations, administrative appeals, and related matters. The City is also seeking to recruit a Pro Tem Hearing Examiner to hear these matters in the absence of the Hearing Examiner. The current Hearing Examiner contract expires on April 30, 2026. The City does not currently have a contract for Pro Tem Hearing Examiner services.

### **PRELIMINARY SCOPE OF WORK**

Services may include all activities and functions authorized by OMC Chapters 18.70 and 18.82. In general, Olympia's Hearing Examiner holds public hearings and decides matters related to land development, including but not limited to:

- Request for variances and conditional use permits
- Preliminary plat approvals
- Shoreline conditional use permits and shoreline variances
- Appeals of administrative decisions
- Land use applications referred to the Hearing Examiner

See Olympia Municipal Code 18.70 and 18.82.120

(<http://www.codepublishing.com/wa/olympia/>) regarding the Olympia Hearing Examiner's authority and jurisdiction.

Both daytime and evening hearings are conducted. These hearings generally have been scheduled twice monthly on Monday evenings. Scheduling is by consultation with the Community Planning and Economic Development Director's designee. Hearing recordings and other meeting support services are provided by the City. Decisions are to be issued timely and in writing as prescribed by law.

## **OBJECTIVES**

To hire a qualified and experienced Hearing Examiner to serve the City of Olympia in accordance with state and local laws, to hear certain land use appeals, development proposals, administrative interpretations/determinations, administrative appeals, and related matters. The City is also seeking to recruit a Pro Tem Hearing Examiner to hear these matters in the absence of the Hearing Examiner. The current Hearing Examiner contract expires on April 30, 2026. The City does not currently have a contract for Pro Tem Hearing Examiner services.

## **QUESTIONS**

For questions about this RFQ, please contact Tim Smith, Director of Community Planning and Economic Development, and the RFQ Coordinator via email at [tsmith@ci.olympia.wa.us](mailto:tsmith@ci.olympia.wa.us). The email subject line should contain the verbiage "Questions regarding the Hearing Examiner and Pro Tem Hearing Examiner". Questions via telephone will not be accepted. All questions to this solicitation must be sent to the RFQ Coordinator via email by **Friday, January 9, 2026 at 4:00 p.m. Pacific Standard Time (PST)**. Questions received after this date may not be answered.

All questions will be answered via an addendum posted on the City of Olympia website.

**To Make Public Records Request:** To obtain records related to this RFQ via a public records request, please visit our Public Records Webpage at <https://www.olympiawa.gov/publicrecords>. Public records fees apply.

## **SCHEDULE**

The following schedule is to inform respondents of the estimated timetable of the SOQ preparation, evaluation, and award. Please note the following dates when preparing your SOQ. The City reserves the right to modify this schedule at its discretion; deadlines for questions and SOQ submissions will never shorten.

SOLICITATION SCHEDULE	DATE
RFQ Issued	December 30, 2025
<b>Deadline for Questions</b>	<b>4:00 p.m. Pacific Standard Time Friday, January 9, 2026</b>
City Issues Q&A Addendum	January 16, 2026
<b>Statements of Qualifications due</b>	<b>4:00 p.m. Pacific Standard Time January 30, 2026</b>
Finalist(s) selected and notified (Tentative)	February 6, 2026
Selection Notification (Tentative)	March 2, 2026

### **STATEMENT OF QUALIFICATIONS REQUIREMENTS**

Interested parties must submit a complete Statement of Qualifications (SOQ) in PDF format. The SOQ must include the following components:

1. **Letter of Interest** - no more than one page in length and include contact information and signature. Please indicate whether you are interested in the Hearing Examiner or Pro Tem Hearing Examiner position. The letter or an attachment to the letter should state all proposed rates and charges including the rate range for hour rate charges. Rates and charges are requested for informational purposes only and will not be scored as part of the SOQ evaluation. Letter should also describe whether applicant is willing and able to provide mentorship to individuals seeking to advance into the profession of providing hearing examiner services.
2. **Summary of qualifications, experience, and availability** – this must be no more four (4) pages in length. It should summarize the applicant’s qualifications to be a Hearing Examiner, relevant experience, and the availability of the applicant to participate in the RFQ process and to provide services to the City.
3. **Method and approach** – this must be no more than two (2) page in length and consist of a summary of the applicant’s approach to providing hearing examiner services and conducting an administrative hearing, including whether the use of “plain talk” is used in the conduct of hearings to assist community members with an understanding of the hearing procedures and issues considered by the hearing examiner in making rulings on cases.

4. **Example of written work** – at least two examples of the applicant’s written decisions or similar products must be provided along with the invoices for those decisions or an explanation about why such invoices cannot be provided.
5. **Example of Rules of Procedure** – The City’s Hearing Examiner is authorized to adopt rules of procedure. The submittal shall include an example of rules of procedure.
6. **Professional References** – at least two professional references, including phone number and other contact information. No more than one page.
7. **Mandatory Bidder Forms** - Include the completed forms attached as Exhibit A (*SOQ Signature Sheet*) and Exhibit B (*Statement of Compliance with Nondiscrimination Requirement and Equal Benefits Declaration Form*). These forms are mandatory and will be evaluated on a pass/fail basis.

**SOQ EVALUATION**

A selection committee of City staff will evaluate consultant qualifications. Selected candidates for Hearing Examiner and Pro Tem Hearing Examiner will be invited for interviews with the City’s Land Use and Environment Committee (LUEC), which is a subcommittee of the Olympia City Council. The LUEC will make a final ranking and will make a selection for recommendation to the City Council based on qualifications, demonstrated competence and technical response to the Request for Qualifications.

Results of reference checks will be used to confirm finalist ranking.

The scoring for the SOQ is as follows:

Criteria	Maximum Points
Knowledge and experience <ul style="list-style-type: none"> <li>• Adjudication or litigation related to land use planning and zoning</li> <li>• Development project review</li> <li>• Growth management</li> <li>• State Environmental Policy Act</li> <li>• Subdivision platting</li> <li>• Shoreline development</li> <li>• Design review</li> <li>• Administrative hearings and procedures</li> <li>• Public works/engineering</li> <li>• Impact fees</li> </ul>	20

<ul style="list-style-type: none"> <li>• Code enforcement</li> <li>• Constitutional principles</li> </ul>	
Experience with writing legally defensible land use decisions or similar products	20
Approach to quality control, case management and decision delivery	15
Making effective use of public resources	10
Experience and manner of holding public meetings and quasi-judicial proceedings and use of “plain talk” in the conduct of hearings	10
Readiness, availability, and familiarity with the process of conducting administrative hearings and quasi-judicial proceedings	10
Experience adopting and administering Rules of Procedure	5
Licensed to practice law in the State of Washington	5
Willingness to provide mentorship to individuals seeking to advance into the profession of providing hearing examiner services	5
Total possible score	100

**STATEMENT OF QUALIFICATIONS SUBMISSION**

Statements of Qualification shall be submitted to the City by email to Tim Smith, Director, Community Planning & Economic Development, RFQ Coordinator, at tsmith@ci.olympia.wa.us. **Only emailed submissions will be accepted.**

The deadline for submission of the Statement of Qualifications is **4:00 pm Pacific Standard Time, Friday, January 30, 2026**. The timestamp of the City of Olympia email system will be considered the official time of submittal. Statements of Qualifications submitted after this deadline will not be accepted. Any errors discovered after RFQ submission deadline must remain and cannot be adjusted.

**CONTRACT**

The City anticipates awarding one (1) or more contracts to the successful respondent(s) for a duration of two years, with an option of extending contract(s) once for an additional two years upon mutual written agreement between the parties to the contract.

The City of Olympia’s [Professional Services Agreement](#) will be the contract document for these services. It is expected that firms are familiar with and willing to agree to the terms of the agreement when submitting a SOQ. The executed agreement shall reflect the specifications stated in this RFQ and the final scope of work between the City and the selected firm. The City will not sign any company’s service agreement, contract or any other form of agreement. The City does reserve the right to extract certain language from a company’s agreement and incorporate it into the City contract, if agreed upon by both parties. The Agreement may be amended upon the mutual written agreement of the City and the respondent.

These contracts are subject to certification of equal benefits provided to all employees. All respondents are advised that the Statement of Compliance with Nondiscrimination Requirement and Equal Benefits Declaration Form (attached as Exhibit "B") will be used for this project.

A copy of the City's Professional Services Agreement template can be obtained at: [https://cms7files.revize.com/olympia/Document\\_center/Government/Contracts%20&%20Purchasing/ProfessionalServicesAgreement-122325.pdf](https://cms7files.revize.com/olympia/Document_center/Government/Contracts%20&%20Purchasing/ProfessionalServicesAgreement-122325.pdf)

### **PAYMENT FOR SERVICES**

Payment for services will be made in accordance with the fee schedule/milestone payment schedule agreed upon in the contract and a voucher or invoice is submitted in the form specified in the contract, and the same is approved by the appropriate City representative. Payment shall be made on a monthly basis, within thirty (30) days after receipt of such voucher or invoice.

### **INSURANCE**

The selected firm must procure and maintain for the duration of this Agreement insurance that meets or exceeds the following limits:

- Automobile Liability insurance with a minimum combined single limit for bodily injury and property damage of \$1,000,000 per accident.
- Commercial General Liability insurance shall be written with limits no less than \$2,000,000 each occurrence and \$2,000,000 general aggregate.
- Professional Liability insurance shall be written with limits no less than \$1,000,000 per claim and \$1,000,000 policy aggregate limit.
- Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.

The City of Olympia, its officers, officials, employees, and volunteers must be included as additional insureds on the policy.

A Certificate of Insurance and corresponding Additional Insured Endorsement form(s) must be provided to and approved by the City before work can begin.

The cost of such insurance shall be paid by the Consultant.

Please refer to Section 11 of the [Professional Services Agreement](#) to review the full insurance requirements.

## **TITLE VI**

The City of Olympia, in accordance with the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252, 42 U.S.C. §§ 2000d to 2000d-4) and the Regulations, hereby notifies all respondents that it will affirmatively ensure that any contract entered into pursuant to this advertisement, disadvantaged business enterprises will be afforded full and fair opportunity to submit bids in response to this invitation and will not be discriminated against on the grounds of race, color, or national origin in consideration for an award.

## **TERMS AND CONDITIONS**

1. All SOQs will be reviewed by the City to determine compliance with the requirements of this RFQ. Failure to meet any requirement may result in the SOQ being deemed non-responsive.
2. Submitting an SOQ does not obligate the City to award a contract or reimburse any costs incurred in the preparation or presentation of the response, including but not limited to site visits, interviews, or demonstrations.
3. All SOQs and accompanying documentation submitted in response to this RFQ become the property of the City and are subject to public disclosure under Washington State law.
4. SOQs must remain valid for ninety (90) days following the submission deadline.
5. Respondents are solely responsible for ensuring receipt of the most current RFQ and all issued addenda.
6. Respondents must promptly notify the City of any ambiguities, inconsistencies, or errors in the RFQ. Failure to do so will be interpreted as acceptance of the RFQ as written.
7. The City reserves the right to reject any or all SOQs; waive minor informalities or irregularities; request additional information for evaluation purposes; revise or amend the RFQ through written addenda; negotiate final terms with the selected respondent(s); and decline to award a contract as a result of this RFQ.
8. Any resulting agreement will be in a format provided by the City and will reflect the requirements of this RFQ.

9. The selected respondent must obtain a City of Olympia business license prior to contract execution. Information can be found on the City of Olympia website at [https://www.olympiawa.gov/business/business\\_licenses.php](https://www.olympiawa.gov/business/business_licenses.php).
10. A certificate of insurance and additional insured endorsement meeting the requirements in the City's Professional Services Agreement must be submitted upon notification of award.
11. The selected respondent must comply with all applicable federal, state, and City regulations, including labor laws.
12. Any resulting contract shall be governed by the laws of the State of Washington, with legal actions brought in Thurston County, Washington.
13. By submitting an SOQ, the respondent acknowledges the City's right to manage the solicitation process in accordance with applicable laws and agrees to follow any formal protest procedures set forth in the RFQ.
14. SOQs may be modified by the respondent prior to the submission deadline by providing written notice to the RFQ Coordinator.
15. SOQs may be withdrawn by the respondent by providing written notice to the RFQ Coordinator.

**Exhibit "A"**  
**SOQ SIGNATURE SHEET**

Solicitation Name: \_\_\_\_\_

Legal Name: \_\_\_\_\_

Business Name: \_\_\_\_\_

Address: \_\_\_\_\_

Unified Business Identifier (UBI) No.: \_\_\_\_\_

M/W/DBE Certification No. (If Applicable): \_\_\_\_\_

**For questions regarding this Statement of Qualifications, the City RFQ Coordinator should contact the following individual:**

Name: \_\_\_\_\_

Telephone No.: \_\_\_\_\_

Email Address: \_\_\_\_\_

**Signature of Authorized Official**

The Consultant is hereby advised that by signature of this Statement of Qualifications, they are deemed to have acknowledged all requirements and signed all certificates contained herein.

Signature: \_\_\_\_\_

Name of Person Signing: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Email Address: \_\_\_\_\_

**Exhibit "B"**  
**STATEMENT OF COMPLIANCE WITH NONDISCRIMINATION REQUIREMENT  
AND  
EQUAL BENEFITS DECLARATION**

The Olympia City Council mandates compliance with the City's *Nondiscrimination in Delivery of City Services or Resources* ordinance (OMC 1.24) and *Employee Benefits* ordinance (OMC 3.18) for all services provided by City employees or through contracts with other entities. All contract agencies or vendors and their employees must understand and fully carry out the City's nondiscrimination policy. Accordingly, each City agreement or contract for services contains language that requires an agency or vendor to agree that it shall not unlawfully discriminate against an employee or client based on any legally protected status. This includes but is not limited to: race, creed, religion, color, national origin, age, sex, marital status, veteran status, sexual orientation, gender identity, genetic information, or the presence of any disability and any other status protected from discrimination by state or federal law. Unlawful discrimination includes transphobic discrimination or harassment, including transgender exclusion policies or practices in employee benefits.

Listed below are methods to ensure that this policy is communicated to your employees, if applicable.

- Nondiscrimination provisions are posted on printed material with broad distribution (newsletters, brochures, etc.).
- Nondiscrimination provisions are posted on applications for service.
- Nondiscrimination provisions are posted on the agency's web site.
- Nondiscrimination provisions are included in human resource materials provided to job applicants and new employees.
- Nondiscrimination provisions are shared during meetings.

**Failure to implement at least two of the measures specified above or to comply with the City of Olympia's nondiscrimination ordinance constitutes a breach of contract.**

By signing this statement, I acknowledge compliance with the City of Olympia's Nondiscrimination ordinance by the use of at least two of the measures specified above.

If this contract is valued at \$50,000 or more, I affirm that Consultant listed below complies with the City of Olympia Equal Benefits Ordinance (OMC 3.18) and shall, prior to contracting with the City, have policies in place prohibiting discrimination in the provision of employee benefits.

Should I operate as a sole proprietor, I agree not to discriminate against any client, or any future employees, based on any status protected from discrimination by state or federal law.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Printed Name of Signatory

\_\_\_\_\_  
Consultant Name



# SCHEIBMEIR, KELLY & NELSON, PS

## ATTORNEYS AT LAW

Personal Service: 299 NW CENTER STREET  
Mailing: PO BOX 939  
CHEHALIS, WASHINGTON 98532  
PHONE: (360) 748-3386 / FAX: (360) 748-3387  
www.centerstlaw.com

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January 21, 2026

**VIA EMAIL (tsmith@ci.olympia.wa.us)**

Mr. Tim Smith  
Planning & Engineering Manager  
City of Olympia  
601 4th Avenue East  
Olympia, Washington 98501

Re: Hearing Examiner Position

Dear Tim:

This letter is in response to the City's recent RFQ for the position of Hearing Examiner. As you know, I have served as the City's Hearing Examiner since 2013. I would like to continue in the role if possible.

As the City already has most of my information, I am reducing my application materials to: (1) a copy of my 2022 RFQ response; (2) sign copies of the required Declarations; and (3) responses to the additional questions posed in the most recent RFQ.

My status is largely unchanged from my 2022 application. Since that application, I have been selected as the Skamania County Hearing Examiner and have also been selected as Hearing Examiner for several additional cities, most notably Tumwater, Gig Harbor, University Place, and Issaquah. As a result, I am currently serving three counties and approximately twenty cities and towns.

I have also largely retired from my private practice effective the end of 2025, leaving only my work as a Hearing Examiner. My partial retirement should make the scheduling of hearings somewhat easier.

My current hourly rate is \$275 per hour. I would be willing to maintain this rate for the duration of the four-year agreement.

The current RFQ inquiries into the possibility of mentoring other interested applicants. I believe that I have previously expressed my willingness to help mentor interested applicants and I remain willing to do so. Somewhat relatedly, it is my goal to have another member of my firm eventually be able to assume my work as Hearing Examiner, recognizing that each jurisdiction would be required to approve the change.

The RFQ also inquires as to the use of "plain talk". I believe that my response to the previous RFQ spoke to this issue. To elaborate upon what I may have said in that earlier response, I recognize that the majority of individuals who come before the Hearing Examiner do not have legal counsel and may have had little previous experience with the City's land use

regulations. At the same time, these individuals may find that the matter pending before the Hearing Examiner has tremendous potential impact to their property, and that their property is their single most important asset. In contested hearings it is unavoidable that one or more parties will be disappointed with the outcome. But while it is not possible to make all interested parties pleased with the outcome, it is possible to at least make them feel that they have been carefully listened to; that their concerns have been considered; and that the decision is written in a manner which makes it easily understandable. I would invite you to confer with your planning and other staff to see if they find my approach to be consistent with these goals.

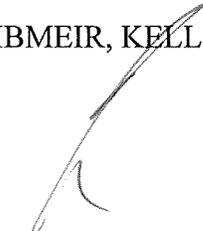
The RFQ also seeks examples of Rules of Procedure. As you know, Olympia has operated under the same Rules of Procedure for many years. Rules very similar to Olympia's are currently used in a number of nearby cities. I am enclosing two examples of somewhat different Rules currently used in the Cities of Issaquah and Black Diamond.

Again, please let me know if this abbreviated application is sufficient. In advance, thank you for your consideration of my application.

Very truly yours,

SCHEIBMEIR, KELLY & NELSON, P.S.

By



Mark C. Scheibmeir  
*mark@centerstlaw.com*

**Exhibit "A"**  
**SOQ SIGNATURE SHEET**

Solicitation Name: \_\_\_\_\_

Legal Name: Mark C. Scheibmeir

Business Name: Scheibmeir, Kelly & Nelson, P.S.

Address: P.O. Box 939, Chehalis, WA 98532

Unified Business Identifier (UBI) No.: 601-088-580

M/W/DBE Certification No. (If Applicable): \_\_\_\_\_

**For questions regarding this Statement of Qualifications, the City RFQ Coordinator should contact the following individual:**

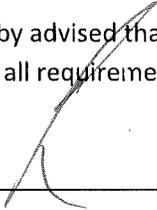
Name: Mark C. Scheibmeir

Telephone No.: 360-748-3386

Email Address: mark@centerstlaw.com

**Signature of Authorized Official**

The Consultant is hereby advised that by signature of this Statement of Qualifications, they are deemed to have acknowledged all requirements and signed all certificates contained herein.

Signature:  \_\_\_\_\_

Name of Person Signing: Mark C. Scheibmeir

Title: \_\_\_\_\_

Date: January 20, 2026

Email Address: mark@centerstlaw.com

**Exhibit "B"**  
**STATEMENT OF COMPLIANCE WITH NONDISCRIMINATION REQUIREMENT  
AND  
EQUAL BENEFITS DECLARATION**

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Listed below are methods to ensure that this policy is communicated to your employees, if applicable.

- Nondiscrimination provisions are posted on printed material with broad distribution (newsletters, brochures, etc.).
- Nondiscrimination provisions are posted on applications for service.
- Nondiscrimination provisions are posted on the agency's web site.
- Nondiscrimination provisions are included in human resource materials provided to job applicants and new employees.
- Nondiscrimination provisions are shared during meetings.

**Failure to implement at least two of the measures specified above or to comply with the City of Olympia's nondiscrimination ordinance constitutes a breach of contract.**

By signing this statement, I acknowledge compliance with the City of Olympia's Nondiscrimination ordinance by the use of at least two of the measures specified above.

If this contract is valued at \$50,000 or more, I affirm that Consultant listed below complies with the City of Olympia Equal Benefits Ordinance (OMC 3.18) and shall, prior to contracting with the City, have policies in place prohibiting discrimination in the provision of employee benefits.

Should I operate as a sole proprietor, I agree not to discriminate against any client, or any future employees, based on any status protected from discrimination by state or federal law.

\_\_\_\_\_  
Signature

**Mark C. Scheibmeir**  
\_\_\_\_\_  
Printed Name of Signatory

\_\_\_\_\_  
January 20, 2026

Date

\_\_\_\_\_  
Consultant Name

**HILLIER, SCHEIBMEIR,  
KELLY & SATTERFIELD, P.S.**

**MARK C. SCHEIBMEIR**  
**BRIAN J. KELLY**

**WILLIAM T. HILLIER**  
Retired

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[www.centersllaw.com](http://www.centersllaw.com)

**ERIN L. HILLIER**  
**SAMUEL D. SATTERFIELD**

**MICHAEL P. ROEWE**  
In Memoriam

January 11, 2022

**VIA EMAIL (tsmith@ci.olympia.wa.us)**

Mr. Tim Smith  
Planning & Engineering Manager  
City of Olympia  
601 4th Avenue East  
Olympia, Washington 98501

Re: Hearing Examiner Position

Dear Tim:

This letter is in response to the City's recent RFQ for the position of Hearing Examiner. I would like to continue in the role as the City's Hearing Examiner and am submitting the enclosed materials in response to the RFQ.

As you know, I have been serving as Olympia's Hearing Examiner for the past nine years, since 2013. As the current Hearing Examiner, I am uncertain as to how much additional information you feel is necessary. I am therefore lessening my responses knowing that the City is well aware of my work. For similar reasons, my listed references exclude any Olympia officials and my attached decisions exclude any Olympia decisions. I trust that all of this makes sense. Should my proposal fail to include any of the requested information, please let me know and I will promptly supplement.

In advance, thank you for your consideration of my proposal.

Very truly yours,

HILLIER, SCHEIBMEIR,  
KELLY & SATTERFIELD, P.S.

By

  
Mark C. Scheibmeir  
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## METHOD AND APPROACH

I will attempt to make this statement of my method and approach as non-repetitive of other materials as possible. I apologize for any overlap.

I have served as a Hearing Examiner for more than 26 years for both counties and cities, and cities both large and small. While there are common threads in the land use planning of all of these jurisdictions, each has its own approach and vision. It has been my goal to render decisions reflecting the jurisdiction's vision of its land use, not my own. To that end, my decisions may at times seem progressive while at other times less so depending on the jurisdiction's Comprehensive Plan, Development Regulations, Shoreline Master Program, etc.

As an appointed Hearing Examiner, I recognize that I have not been elected to the position and have not been empowered to establish land use policy, as this role is reserved to the elected governing body. My role is limited to applying the received facts to the Comprehensive Plan and Development Regulations enacted by the governing body. At times, members of the public would prefer that I expand my role and that I be more responsive to their wishes - especially when those wishes are expressed in large numbers - but I have respectfully declined, as to do so would usurp the role of elected officials.

I have been practicing law for more than 40 years. While my private practice involves some representation of small businesses, much of my other work involves assisting individuals with their real estate issues. This other, non-hearing examiner work offers me a unique perspective on the consequences of land use decisions. I fully understand how approving or denying a proposed land use has rippling effects across neighboring properties, neighborhoods, and the community as a whole. In particular, I realize that for most individuals their home is their most significant asset and that my decision may affect the value of that asset. I strive to never forget this.

Land use hearings, and land use decisions, are only effective if all of the participants believe they have an equal right to be heard and that their concerns are fully considered. It is simply not possible to render decisions that please all interested parties, but it is possible to render decisions that leave the participants believing they have been given a fair opportunity to be heard. It has been, and remains, my goal to conduct hearings that achieve this result while carving out the jurisdiction's vision of its land use.

## SUMMARY OF QUALIFICATIONS, EXPERIENCE AND AVAILABILITY

### A. CV OF ACADEMIC AND PROFESSIONAL QUALIFICATIONS

Bachelor of Science in Business Administration (with honors) from the University of Kansas in 1978.

Law Degree from the University of Washington Law School in 1981.

Private law practice in Chehalis, Washington from 1981 to the present, or 41 years.

#### **Hearing Examiner Experience**

Hearing Examiner for Lewis County since the position was created in 1996, or 26 years.

Hearing Examiner for Cowlitz County since 2007.

Hearing Examiner for the City of Olympia since 2013.

Hearing Examiner for Cities of Black Diamond and Yelm commencing late 2021.

Also Hearing Examiner for the Cities of Kelso, Castle Rock, and Elma, and the Towns of Cathlamet and Vader.

#### **Additional Background Information**

I have been practicing law in Chehalis since 1981, or for the past 41 years. In addition to my work as Hearing Examiner, my practice centers on real estate, business and estate planning matters. I have been involved in community activities throughout my professional career, including nearly 30 years of service on the Centralia College Foundation. In 2017 I was appointed by Governor Inslee as a Trustee for Centralia College and am currently in my second 5-year term as Trustee.

### B. PREVIOUS EXPERIENCE CONDUCTING PUBLIC HEARINGS RELATING TO LAND USE REGULATIONS

In 1996, Lewis County established the position of Hearing Examiner and I was selected for the position. I have served as the County's Hearing Examiner ever since, or for twenty-six years. My role has expanded over the years to include appeals of dangerous animal notifications as well as appeals relating to the Health Department and Sanitary Code.

In 2007, I became Hearing Examiner for Cowlitz County and have conducted hearings for Shorelines Substantial Development Permits for two nationally-recognized projects: The

Millennium Coal Port proposed for Longview, and the Northwest Innovations Methanol Plant proposed for Kalama.

In 2013, I was selected as Hearing Examiner for the City of Olympia. Since then I have presided over a number of complex, often controversial, land use issues including several new subdivisions and a number of mixed-use projects in the downtown area. The City's land use regulations allow the Director to transfer decision-making authority to me for highly complex or controversial projects including the "Views on 5th" project.

Following the recent retirement of the Hearing Examiner for several cities in Thurston and Pierce Counties, I was asked by two of those cities, Black Diamond and Yelm, to serve as their Hearing Examiner. I am currently under consideration for appointment in one or more similar cities.

As earlier noted, I am also Hearing Examiner for several small cities including Kelso, Castle Rock, Cathlamet and Vader.

It is perhaps important to add that in 26 years of work as a Hearings Examiner I have not had a decision overturned on appeal, including several that have reached the Court of Appeals.

### C. PREVIOUS EXPERIENCE WITH EVALUATION CRITERIA

#### Criteria 1.

- I have 41 years of legal experience, with more than 26 years' experience as a Hearing Examiner.
- I have presided over hundreds of hearings relating to land use planning. Many of these hearings have been extremely complex and/or controversial, involving difficult legal issues and significant public participation.
- I am responsible for development project review in all of the jurisdictions I serve. This authority includes master plan development, subdivisions and mixed-use projects.
- I am intimately familiar with the Growth Management Act and its application to development in both cities and counties.
- I am quite familiar with SEPA and have conducted numerous SEPA-related hearings.
- I am responsible for subdivision approval in the City of Olympia as well as in other jurisdictions I serve.

- I am very familiar with the Shoreline Management Act (SMA) and the Shoreline Master Program (SMP) of Olympia as well as the other SMP's jurisdictions I am currently involved with. As earlier noted, my Shoreline Decisions for the Millennium Bulk Terminal Port in Longview and the Kalama Methanol Plant received national attention.

- I am familiar with the design review process and, in particular, the Olympia design review process.

- As previously noted, I have conducted hundreds of hearings relating to land use; have established rules and procedures for those hearings; and have been responsible for the orderly management of hearings that, on occasion, have involved several hundred participants.

- I have significant experience addressing public utilities, engineering and transportation issues, and have reviewed countless Traffic Impact Analyses.

- I am familiar with impact fees, including Olympia's. My decision in the Douglass Properties appeal involved a thorough analysis of Olympia's impact fees. My decision was subsequently affirmed by the Washington State Court of Appeals.

- I am fully aware of the constitutional principles involved in land use including, in particular, those relating to Substantive Due Process, Standing and the Vested Rights Doctrine.

Criteria 2. I would invite the City to review my previous land use decisions for the City as evidence of my legal writing ability. As earlier noted, in more than 26 years of work as a Hearing Examiner I have not had a decision overturned on appeal. I hope that this speaks to the clarity of my legal writing and the strength of my legal analysis.

Criteria 3-5. I have been involved in land use hearings with as many as 500 participants and thousands of exhibits, and with decisions running 100 pages or more in length. Even in such complex hearings I have managed to control the hearing and render a written decision within the allowed time. I have adjusted my hearing procedures to best accommodate the challenges associated with Covid. I am equally comfortable in conducting either in-person or remote hearings, understanding that the primary goal is to ensure that every participant is given a full opportunity to be heard.

Criteria 6. As evidenced by my prior work for the City, I am available at all days and times preferred by the City for its hearings. I am very familiar with all of the City's staff and its hearing protocols. I am also familiar with the City's current rules and procedures (having prepared them).

Criteria 7. I have been licensed to practice law in the State of Washington since 1981, or 41 years.

Criteria 8. My references are as follows:

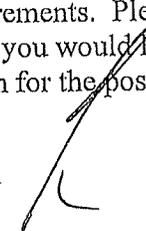
1. Lee Napier, Lewis County Community Development Director.  
Telephone: (360) 740-2606.
2. Greta Holmstrom, Interim Director of Planning for Cowlitz County.  
Telephone (360)577-3052 (ext. 6676).

**D. RECENT WRITTEN DECISIONS**

I am enclosing two recent written decisions, one from Lewis County and one from Cowlitz County. I have selected these decisions as they involve somewhat controversial projects with notable public participation. The Lewis County matter involves an application by the County for a Shorelines Substantial Development Permit to establish a County-owned park along the Cowlitz River near Packwood to allow a put-in location for kayakers on the upper Cowlitz (approved). The Cowlitz County matter involves an after-the-fact variance to resolve conflicts between a marijuana manufacturing facility and an adjoining historic cemetery (approved). An invoice for the Cowlitz County matter is attached. I am paid a monthly retainer from Lewis County and therefore do not have a separate invoice for the individual hearings.

**SUMMARY**

I hope that I have responded to all of the RFQ requirements. Please let me know if there is any additional information you need or any other matters you would like to discuss. In advance, thank you for your consideration of my application for the position of Hearing Examiner.

  
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Mark C. Scheibmeir

# CITY OF BLACK DIAMOND HEARING EXAMINER RULES OF PRACTICE AND PROCEDURE

**Note: These Rules of Procedure were amended by the Hearing Examiner on August 11, 2014 in order to renumber Section 3.15, Subpoenas, to 2.32.**

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## **SECTION 1: GENERAL PROVISIONS**

### **1.01 APPLICABILITY**

These Hearing Examiner Rules (Rules) are adopted to supplement the ordinance requirements for matters within the Hearing Examiner's jurisdiction and govern administrative practice and procedure before the Hearing Examiner. In any case of conflict between a Hearing Examiner Rule (HER) and the Black Diamond Municipal Code (Code), the Code shall control.

### **1.02 EFFECTIVE DATE**

These Rules shall apply to all matters filed with or otherwise properly before the Hearing Examiner on or after the effective date of adoption of these Rules by the Hearing Examiner.

### **1.03 INTERPRETATION OF RULES**

(a) The Hearing Examiner shall interpret the Hearing Examiner Rules of Practice and Procedure and determine how the Rules apply in specific instances. An affected party may petition the Hearing Examiner during the pendency of a matter under review to request a declaratory ruling regarding the applicability of these Rules to specific actual circumstances. Except during hearing, such request must be in writing and clearly identify the subject Rules and describe the circumstances for which the declaratory ruling is sought.

(b) Where questions of practice and procedure arise that are not addressed by these Rules, the Hearing Examiner shall determine the practice or procedure that she or he deems most appropriate and consistent with providing fair treatment and due process. In making such determinations, the Hearing Examiner may look to the current Civil Rules of Superior Court for guidance.

## **SECTION 2: RULES OF GENERAL APPLICATION**

### **2.01 SCOPE**

Rules in this section apply generally to all matters where the Hearing Examiner has authority to decide or recommend the outcome.

### **2.02 DEFINITIONS**

The following definitions shall apply unless the context or subject matter requires otherwise:

(a) "Affidavit" - a written or printed statement declared or certified to be true and correct under penalty of perjury under the laws of the state of Washington. "Affidavits" includes the declarations authorized under RCW 9A.72.085, as now or hereafter amended.

(b) "Appeal" - a challenge to a decision or other action where the MCC or other authority authorizes the Hearing Examiner to review and decide.

- (d) "Appellant" - the person(s), organization, association, corporation, or other entity who files a complete and timely appeal of a decision or other appealable action.
- (e) "Applicant" - the person(s), organization, association, corporation or other entity who files an application or otherwise formally requests a permit or other type of County action, interpretation, or authorization which is the subject of an appeal or other review by the Hearing Examiner.
- (f) "Code" – Black Diamond Municipal Code (BDMC).
- (g) "Code Enforcement Action" - Any civil proceeding the purpose of which is to stop a person or entity from violating any provision of the Black Diamond Municipal Code.
- (h) "Days" - calendar days.
- (i) "Department" - the department, agency, board, commission or other County entity responsible for the recommendation, decision or other action that is subject to review by the Hearing Examiner.
- (j) "Director" - the head of the department, agency, board or commission, or other unit of County government or the department head's designee responsible for the recommendation, decision or other action that is subject to review by the Hearing Examiner.
- (k) "Examiner" - the Hearing Examiner, or a Deputy Hearing Examiner or an alternate Hearing Examiner who has been delegated responsibility by the Hearing Examiner or County Commissioners to conduct a hearing or otherwise preside over a particular matter.
- (l) "Ex parte communication" - a communication between one party and the Examiner in the absence of the other party(s).
- (m) "Hearing Examiner" – same as "Examiner".
- (n) "Interested person" - any individual, or public or private organization of any character, significantly affected by, or interested in proceedings before the Hearing Examiner, including any party.
- (o) "Motion" - a request made to the Hearing Examiner, whether written or oral, for an order or other ruling.
- (p) "Order" - a ruling, instruction, or other directive issued by the Hearing Examiner in response to a request or motion by a party, or on the Hearing Examiner's own initiative.
- (q) "Party" - the person(s), group, organization, corporation, or other entity that has filed a development permit application or an appeal, or is granted right of appeal automatically by ordinance; the person(s), group, organization, corporation, or other entity granted party status

through intervention; County staff when the County is prosecuting a code enforcement action or has a decision subject to appeal before the Examiner; the person(s), group, organization, corporation, or other entity who filed the application, request, or petition for a permit or other type of City authorization or action which is the subject of the appeal; the owner(s) of the property subject to the City decision or other action.

(r) "Public hearing" - a hearing held by the Hearing Examiner for the purpose of developing a record to substantiate a recommendation or decision. Serves as the "open record hearing" as defined in the Regulatory Reform Act, Chapter 36.70B RCW.

(s) "Representative" - that individual designated by a party to be the official contact person and to speak for the party.

(t) "Rule(s)" - the Hearing Examiner Rules of Practice and Procedure, as currently amended.

(u) "Timely" - within the time prescribed by applicable ordinance or, in the absence of ordinance provision, the time prescribed by Hearing Examiner rule, or within the time determined by the Hearing Examiner.

(v) "Witness" – Any person who provides testimony (sworn or unsworn) at a hearing.

### **2.03 HEARING EXAMINER'S JURISDICTION**

The Hearing Examiner can only hear and make recommendations and decisions in those matters and on those issues where ordinance or other appropriate authority grants to the Hearing Examiner the authority to do so. The Hearing Examiner does not have the authority to rule on the validity of ordinances.

### **2.04 COMPUTATION OF TIME**

Except as otherwise provided by the Code, computation of any period of time prescribed or allowed for matters before the Hearing Examiner, shall begin with the first day following that on which the act or event initiating such period of time shall have occurred. When the last day of the period so computed is a Saturday, Sunday, or national, state or City holiday, the period shall extend to the end of the next day when the County offices are open for business.

### **2.05 FILING AND SERVICE OF DOCUMENTS**

(a) Documents shall be deemed filed with the Hearing Examiner on receipt at the City of Black Diamond Department of Community Development located at 24301 Roberts Drive with a mailing address of City of Black Diamond Department of Community Development, P.O. Box 599, Black Diamond, WA 98010.

(b) Documents shall be served personally or, unless otherwise provided by applicable ordinance, by first-class, registered, or certified mail, or by facsimile (fax) transmission. Service shall be

regarded as complete upon deposit in the regular facilities of the U.S. Mail of a properly stamped and addressed letter or packet, or at the time personally delivered, or transmitted by fax.

## **2.06 EXPEDITIOUS PROCEEDINGS**

To the extent practicable and consistent with requirements of law, hearings shall be conducted expeditiously. At every stage in the proceedings, all parties shall make every reasonable effort to avoid delay.

## **2.07 SCHEDULING HEARINGS**

The City of Black Diamond Department of Community Development shall promptly schedule hearings after consultation with the Hearing Examiner.

## **2.08 CONSOLIDATION**

Where practical, feasible, and consistent with ordinance requirements, all matters under the jurisdiction of the Hearing Examiner relating to the same matter, should be consolidated for hearing. The Hearing Examiner may order consolidation with or without a request from any party.

## **2.09 PRESIDING OFFICIAL**

- (a) The Hearing Examiner shall preside over hearings held under these Rules.
- (b) The Examiner conducting a hearing shall have the duty to ensure a fair and impartial hearing, to take all necessary action to avoid undue delay in the disposition of proceedings, and to maintain order. The Examiner shall have all powers necessary to these ends, including, but not necessarily limited to the following:
1. Determine the order of presentation of evidence;
  2. Administer oaths and affirmations;
  3. Rule on offers of proof and receive evidence;
  4. Rule on procedural matters, objections and motions;
  5. Question witnesses and request additional exhibits;
  6. Permit or require oral or written argument or briefs and determine the timing and format for such submittals;
  7. Regulate the course of the hearings and the conduct of the parties and others so as to maintain order and provide for fair hearing;

8. Make and issue the decision or recommendation.

## **2.10 DISQUALIFICATION OR RECUSAL OF AN EXAMINER**

(a) In the interest of fairness to the parties, an Examiner on his/her own initiative may recuse himself/herself from hearing a particular matter in the event of personal bias, prejudice, financial interest, or other substantial reason.

(b) Prior to hearing, a party may request that the Hearing Examiner assign a different Examiner to hear a particular matter. The request must be in writing, submitted at least seven (7) days prior to the day the hearing is to begin, with a copy of the request to each of the other parties. The request must set forth the reasons for the belief that personal bias, prejudice, financial interest, or other substantial reason for disqualification or recusal exists.

(c) In case of disqualification or recusal, the Hearing Examiner shall reassign the matter to a different Examiner.

## **2.11 WITNESSES**

(a) All witnesses except citizens expressing their opinion as identified in HER 4.03 are subject to cross-examination by the other party(s).

(b) The rules of privilege shall be effective to the extent recognized by law.

(c) Hearing Examiner hearings are open to the public. However, in code enforcement actions and the appeals thereof, persons who are not parties are generally not permitted to testify unless called as witnesses. In closed record appeals as defined by the Regulatory Reform Act, Chapter 36.70B RCW, only persons who previously contributed to the record are allowed to present argument.

(d) The Examiner may limit the length of testimony to expedite the proceedings and avoid the necessity to continue the hearing. Maximum practicable advance notice will be provided if such time limitations are to be imposed. If parties are unable to complete their arguments and testimony within the allotted time, an opportunity will be granted to submit written materials after the close of the hearing; other parties will be allowed an opportunity to offer written rebuttal to any such materials.

(e) At the discretion of the Examiner, or where the parties agree and the rights of the parties will not be prejudiced, the Examiner may allow testimony via telephone or television or similar electronic means if the County has the technology available. Each party to the proceeding shall have the opportunity to hear (or, if televised, to both hear and see) testimony given in this manner and to question the person giving such testimony.

## **2.12 EXPECTED CONDUCT**

(a) All persons appearing before the Hearing Examiner shall conduct themselves with civility and courtesy to all persons involved in the hearing.

(b) No party or other person shall communicate with an Examiner presiding over a matter or with any employee of the Hearing Examiner's Office in an attempt to influence the outcome or to discuss the merits of that matter.

(c) No party or other person, other than staff when not acting as a party, shall make or attempt ex parte communication with the Examiner regarding any matter under pending review by the Examiner. Procedural matters may be addressed by written correspondence, copied to all known parties. In all matters involving an open record hearing, prior to and during the hearing, the Examiner may ask County staff to submit additional information into the record.

(d) If a substantial prohibited ex parte communication is made, such communication shall be publicly disclosed by the Examiner: any written communications, and memorandums summarizing the substance and participants of all oral communications, shall promptly be made available to the parties for review and an opportunity to rebut those communications.

### **2.13 MOTIONS**

(a) All motions, other than those made during a hearing, shall be in writing, and shall state the order or relief requested and the grounds for the motion. Every motion and answering statement and accompanying papers, shall be served on each party representative on the day it is filed with the Hearing Examiner.

(b) Within seven (7) days after service of any written motion, or such longer or shorter period of time as may be designated by the Hearing Examiner, the other party(s) shall file a written answer. When the Hearing Examiner has received the answering statement(s), or the seven (7) days or other period of time designated by the Hearing Examiner has elapsed, the Hearing Examiner shall rule on the motion. Failure of a party to file a timely response, may be considered by the Hearing Examiner as evidence of that party's consent to the motion.

(c) The Hearing Examiner may call for oral argument prior to ruling if consistent with state law.

(d) For motions made at hearing or for motions made for the extension of time or the expedition of hearings, the Hearing Examiner may waive the requirements of this section and may also rule upon such motions orally.

### **2.14 EVIDENCE**

(a) Evidence, including hearsay, may be admitted if, in the judgment of the Examiner, it is relevant to the issue(s) on appeal, comes from a reliable source, and has probative (proving) value. Such evidence is that which would commonly be relied upon by responsible persons in the conduct of their important affairs.

(b) The Examiner may exclude evidence that is irrelevant, unreliable, immaterial, unduly repetitive, or privileged.

(c) Opinion evidence of non-experts presented at public hearings is discouraged but may be admitted, although it need not be given weight by the Examiner.

(d) Documentary evidence may be received in the form of copies or excerpts. The Examiner may require that the parties be given an opportunity to compare the copy with the original, and that the complete document from which an excerpt is taken be made available for inspection by all parties.

### **2.15 OFFICIAL NOTICE**

(a) The Examiner may take official notice of judicially cognizable facts. In addition, the Examiner take notice of general, technical, or scientific facts within his or her specialized knowledge.

(b) Parties must be notified during the hearing, or before issuance of decision, of the specified facts or materials noticed and the source thereof, and afforded an opportunity to contest or rebut the facts or materials so noticed if additional evidence may still be admitted as restricted by state law.

(c) A Hearing Examiner ruling, decision, or recommendation may refer to and utilize any part of the Code or any state law and any issued Hearing Examiner decision.

### **2.16 SITE INSPECTION**

Where it would assist the Examiner in clarifying or understanding the evidence adduced at hearing, the Examiner may inspect property subject to Examiner review prior to the close of the record.

### **2.17 CONTINUING OR REOPENING HEARING**

(a) A scheduled hearing may be continued for good cause as determined by the Hearing Examiner. Motions for continuance shall be served and received by all parties and the Examiner at least seven days prior to the hearing date, unless extraordinary circumstances justify a later date. Written notice of the date, time, and place of the continued hearing shall be provided to each party and the County. The notice of a rescheduled hearing need not observe the time requirements to which the original notice was subject.

(b) Prior to the issuance of the subject decision or recommendation, the Examiner may continue or reopen (if consistent with state law) proceedings for good cause and may permit or require written briefs or oral argument.

(c) If the Examiner determines at hearing that there is good cause to continue such proceeding and then and there specifies the date, time, and place of the new hearing, no further notice is required

(d) If a matter is reopened after conclusion of the hearing, parties shall be provided not less than ten (10) days notice of the reopened hearing.

### **2.18 LEAVING THE RECORD OPEN**

(a) The Examiner may leave the record of hearing open at the conclusion of a hearing in order to receive argument or for other good purpose. Parties shall be provided notice of the consideration of any evidence received after hearing and shall have an opportunity to review such evidence and to file rebuttal evidence or argument.

(b) Except as provided elsewhere in these Rules, information submitted after the close of the record shall not be included in the hearing record or considered by the Examiner making the decision or recommendation.

### **2.19 DISTRIBUTION OF DECISIONS AND RECOMMENDATIONS**

A copy of the Hearing Examiner's decision or recommendation shall be distributed to each party representative, to those persons who have specifically requested a copy, and to others as specified by applicable ordinance(s).

### **2.20 REMAND**

(a) Prior to the issuance of the Hearing Examiner's recommendation or decision, if the Examiner determines that information, analysis, or other material necessary to the Hearing Examiner's recommendation has not been provided, the matter may be remanded to the Department for the addition of that information, analysis, or other material if allowed by state law.

(b) Where the Hearing Examiner's decision is to remand the matter to the Department for additional information, analyses, or other material, the Hearing Examiner shall retain jurisdiction in order to review the adequacy of that information, analysis, or other material. The Examiner may then issue a final decision or recommendation using the additional information. The decision to remand shall expressly state that jurisdiction is retained and what information, analysis, or other material is to be provided, and it may indicate when it is to be submitted. A copy of that information, analysis, or other material shall also be provided to each party to the proceeding, except where the size or condition of the required materials make copying impractical, notification to the other parties of the submittal, shall be sufficient. The parties shall have an opportunity to review, comment upon, and submit rebuttal to the information, analysis, or other material submitted. At the discretion of the Examiner and consistent with state law, the hearing may be reopened following such submittal.

(c) Where the decision of the Hearing Examiner is to remand for the preparation of a new departmental decision, the Hearing Examiner's jurisdiction is terminated and Director's subsequent decision shall be issued and subject to appeal in accordance with applicable ordinance(s).

#### **2.21 TERMINATION OF JURISDICTION**

The jurisdiction of the Hearing Examiner is terminated upon the issuance of the decision or recommendation except where jurisdiction is expressly retained, or as otherwise provided in ordinance or in these Rules, or when a matter is remanded to the Hearing Examiner by the County Commissioners.

#### **2.22 CLERICAL ERRORS**

Clerical mistakes in decisions, recommendations, orders, or other parts of the record, and errors arising from oversight or omission, may be corrected by Order at the Hearing Examiner's initiation, or in response to the motion of any party.

#### **2.23 PROCEEDINGS RECORDED**

All proceedings before the Hearing Examiner shall be electronically recorded. The recordings of hearings shall be part of the official case record. Copies of the recordings shall be made available to the public upon request, subject to payment of a reasonable fee for copying.

#### **2.24 DISCLOSURE OF PUBLIC RECORDS**

Hearing Examiner decisions and recommendations, the hearing record, and associated official files, are public records and shall be available for public review.

#### **2.25 TRANSCRIPT OF PROCEEDINGS**

(a) Anyone desiring a certified transcript of a hearing may obtain a duplicate copy of the hearing tapes from the City of Black Diamond Department of Community Development and shall be responsible for arranging and paying for the preparation of a verbatim transcript. The completed transcript must be returned to the Hearing Examiner for certification.

(b) The parties shall have an opportunity to review and comment on the transcript. The Hearing Examiner shall resolve conflicts as to form and content of the transcript and provide a certification when such disputes are resolved and the Examiner is satisfied that the transcript provides a reliable record of the proceedings.

#### **2.26 RETENTION OF RECORDS**

The case file, including the tape recording(s) and exhibits, shall be retained by the City of Black Diamond Department of Community Development consistent with the requirements of the Public Records Act (Chapter 42.17 RCW) and applicable retention schedules.

## **2.27 RECORDING DEVICES**

Photographic and recording equipment are permitted at hearings. The Examiner may deny or condition use of such equipment as she or he deems necessary to avoid disruption to the proceedings or prejudice to any party.

## **2.28 APPEARANCE OF FAIRNESS**

The appearance of fairness doctrine applies to proceedings under these Rules.

## **2.29 HEARING EXAMINER'S DECISION**

(a) Issuance. The Hearing Examiner shall issue a written decision and provide a copy of that decision to each party representative within the time required by the applicable ordinance.

(b) Contents. A decision or recommendation of the Hearing Examiner shall include, but not be limited to, a statement regarding the following:

- Background. The nature and background of the proceeding, including identification of party representatives participating in the hearing, prehearing determinations, and other similar information.
- Findings. The individual facts that the Examiner finds relevant, credible, and requisite to the decision, based on the evidence presented at hearing and those matters officially noticed. (This may include recitation of relevant provisions of ordinance, other regulation, or case law.)
- Conclusions. Legal and factual conclusions based upon specific provisions of law and the findings of fact.
- Decision or Recommendation. The Hearing Examiner's decision or recommendation based upon a consideration of the whole record and supported by substantial evidence in the record.
- Postscript. Information regarding subsequent procedural step(s), if any, for appealing the Hearing Examiner's decision.

(c) The decision may also include an order disposing of contested issues and/or directing parties to take actions consistent with the decision.

## **2.30 RECONSIDERATION**

(a) A party as defined in Section 2.02 may file a written motion for reconsideration within 10 calendar days of the date of the Hearing Examiner's decision. The timely filing of a motion for reconsideration shall stay the Hearing Examiner's decision until such time as the motion has

been disposed of by the Hearing Examiner. No party may file a motion to reconsider on a decision issued after reconsideration.

(b) The grounds for seeking reconsideration shall be limited to the following:

1. The Hearing Examiner engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
2. The Hearing Examiner's decision is an erroneous interpretation of the law;
3. The Hearing Examiner's findings, conclusions and/or conditions are not supported by the record;
4. The Hearing Examiner's decision is a clearly erroneous application of the law to the facts; or
5. The Hearing Examiner exceeded the Hearing Examiner's jurisdiction;

(c) The motion for reconsideration must:

1. Contain the name, mailing address and daytime telephone number of the moving party, together with the signature of the moving party;
2. Identify the specific findings, conclusions, actions and/or conditions for which reconsideration is requested;
3. State the specific grounds upon which relief is requested;
4. Describe the specific relief requested; and
5. Where applicable, identify the specific nature of any new evidence. Such new evidence shall be considered only if the additional evidence relates to: (i) the grounds for disqualification of the Hearing Examiner when such grounds were unknown by the moving party at the time the record was created; or (ii) matters that were improperly excluded from the record after being offered by a party.

(d) The Hearing Examiner shall issue a decision on the motion as follows:

1. Deny the motion in writing; or
2. Issue an amended decision; or
3. Accept the motion and set the matter for closed record review with no or limited new evidence or information allowed to be submitted and only written reconsideration arguments allowed. Any written arguments must be filed within 10 calendar days from notice of the Hearing Examiner.

### **2.31 RECORD**

The record of an Examiner proceeding shall include:

1. All evidence received or considered;
2. Pleadings, procedural rulings, and other non-evidentiary materials that are part of the Hearing Examiner's file;
3. Statement of matters officially noticed, if any;
4. Findings, conclusions and decision of the Hearing Examiner;
5. Tape recording of the hearing.

### **2.32 SUBPOENAS**

(a) A request or motion may be made in writing for a subpoena to require a person to appear and testify at a hearing, or for a person to produce specified documents or other physical exhibits at a prehearing conference or at hearing.

(b) A request for a subpoena for a person shall: include the person's name and address; show the relevance of that person's testimony; and, demonstrate the reasonableness of the scope of subpoena sought. A request for a subpoena for documents or other physical exhibits shall: include the name and address of the person who is to produce the documents or other physical exhibit; specify the materials to be produced; indicate the relevance of the materials subpoenaed to the issues on appeal and, demonstrate the reasonableness of the scope of the subpoena sought.

(c) The party requesting the subpoena shall be responsible for serving the subpoena. An affidavit or declaration of personal service or of mailing shall be submitted to the Hearing Examiner as proof of that service.

(d) Except as otherwise allowed by the Hearing Examiner, subpoenas shall be served no less than seven (7) days prior to the appearance or production ordered.

(e) A subpoena may be issued with like effect by an attorney of record in the proceeding. The issuing attorney must sign the subpoena.

(f) Any motion to limit or quash (i.e., vacate or void) a subpoena shall be filed with the Hearing Examiner within seven (7) days of receipt of the subpoenas or such other time as specified by the Hearing Examiner.

(g) Requests for subpoenas and the rulings upon such requests may be made ex parte unless otherwise ordered by the Hearing Examiner.

### **SECTION 3: CODE ENFORCEMENT ACTIONS**

In addition to the Rules of General Application in Section 2, the Rules in Section 3 shall apply to code enforcement actions and the appeals thereof.

#### **3.01 DISMISSAL**

(a) A code enforcement action or appeal thereof may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief, does not comply with filing requirements, or is without merit on its face, frivolous, or brought merely to secure delay.

(b) Any party may request dismissal of code enforcement action at any time with notice to all parties. The Hearing Examiner may make a ruling on a motion to dismiss based upon written arguments or may call for oral arguments.

(c) When an appeal is withdrawn by the issuing Department, the appeal becomes moot and shall be dismissed.

#### **3.02 CLARIFICATION**

Specified parties shall provide clarification, additional information, or other submittals as the Hearing Examiner deems necessary in order that the code enforcement action or appeal thereof can be made complete and understandable. The Hearing Examiner shall rule on the request of any party for clarification of a code enforcement action or appeal thereof. Request for clarification must be made in a timely manner as to afford reasonable opportunity for other parties to prepare response(s) for hearing.

#### **3.03 AMENDMENT**

The Hearing Examiner may allow, for good cause shown, an appeal to a code enforcement action to be amended within 10 days after it has been filed. In deciding whether to allow such an amendment, the Hearing Examiner shall attempt to ensure that the opportunity for a fair hearing by the other parties will not be prejudiced by the amendment.

#### **3.04 WITHDRAWAL OF CODE ENFORCEMENT APPEAL**

(a) An appeal to a code enforcement action may be withdrawn only by the appellant.

(b) Where an appeal is made by several persons, a group, organization, corporation, or other entity, withdrawal shall be made by the person who had been designated as the party representative [See HER 3.05].

(c) An appellant's request to withdraw shall be granted as a matter of right and the appeal dismissed.

### **3.05 PARTY REPRESENTATIVE REQUIRED**

When a party consists of more than one individual, or is a group, organization, corporation, or other entity, the party shall designate an individual to be its representative and inform the Hearing Examiner of the name, address and telephone number of that designated representative. The rights of such an appellant shall be exercised by the person designated as the party representative. Notice or other communication to the party representative, is notice or communication to party.

### **3.06 NOTICE OF APPEARANCE**

When a party is represented by an attorney, the attorney shall file a notice of appearance with the Hearing Examiner and send a copy of that notice to the other parties. Where the appellant's attorney filed the appeal and indicated his/her representative capacity, a notice of appearance does not need to be filed. The notice of appearance shall serve to designate the attorney as the party representative.

### **3.07 INTERVENTION**

(a) Upon a showing of a substantial or significant interest that is not otherwise adequately represented, the Hearing Examiner may permit an interested person, group, organization, corporation, or other entity, who is not a party to a code enforcement action or appeal thereof, to participate in the code enforcement action.

(b) A written request for intervention must be submitted to the Hearing Examiner at least five (5) days prior to the day on which the hearing begins. The intervention request must state the basis for the intervention and how the person, group, organization, corporation, or other entity making the request is affected by or interested in the code enforcement action or appeal thereof. In considering the requested intervention, the Hearing Examiner shall seek to ensure that intervention will not unduly delay the hearing process, will not expand the issues beyond those within the appeal, and will not prejudice the rights of any of the original parties. In granting intervention, the Hearing Examiner may limit the nature and scope of the intervention.

(c) Intervention is not a substitute means of participating in a code enforcement action or appeal thereof for those who could have appealed but failed to do so.

### **3.08 PARTIES' RIGHTS AND RESPONSIBILITIES**

(a) Each party in an appeal proceeding shall have the right to: due notice of hearing, presentation of evidence, rebuttal, objection, cross-examination, argument, and other rights determined by the Hearing Examiner as necessary for the full disclosure of facts and a fair hearing.

(b) Parties have the right to be represented by an attorney. Representation by an attorney is not required.

(c) Where a party has designated a representative, the representative shall exercise the rights of the party.

(d) All parties, witnesses, and others participating in and observing hearings shall conduct themselves with civility and deal courteously with all persons involved in the proceedings.

### **3.09 DEFAULT**

The Hearing Examiner may dismiss an appeal to a code enforcement action by an order of default where the appellant, without good cause, fails to appear or is unprepared to proceed at a scheduled and properly noticed hearing. The Hearing Examiner may also dismiss a code enforcement action and the appeals thereof if the County fails to appear to prosecute its case.

### **3.10 HEARING FORMAT**

(a) Code enforcement hearings, although generally informal in nature, shall have a structured format and shall be conducted in a manner deemed by the Examiner to make the relevant evidence most readily and efficiently available to the Examiner and to provide the parties a fair opportunity for hearing.

(b) Where the Code provides that the defendant or appellant must overcome deference accorded the Director's decision being appealed, the order of hearing is generally as follows:

1. Examiner's introductory statement;
2. Parties' opening statements (optional);
3. Appellant/defendant's presentation of evidence;
4. Department's presentation of evidence;
5. Rebuttal;
6. Closing argument of parties.

(c) Where no deference is accorded the Director's decision, the order of hearing for a code enforcement action or appeal thereof is generally as follows:

1. Examiner's introductory statement;

2. Parties' opening statements (optional);
3. Department's presentation of evidence;
4. Appellant/defendant's presentation of evidence;
5. Rebuttal;
6. Closing argument of parties.

(d) Notwithstanding the order presented above, the order of hearing may be modified or a different order established as the Examiner deems necessary for the clear and fair presentation of evidence. The order of the hearing may also be modified as agreed upon by the parties with the Examiner's approval.

(e) The order of presentation at hearing shall not alter or shift any burden(s) or presumption(s) established by applicable law(s).

### **3.11 COMMUNICATIONS FROM NON-PARTIES**

(a) Written communications received from non-parties regarding a pending matter, shall be disclosed by the Examiner at hearing for the review of all parties.

(b) The Examiner, after considering the objections of the parties and determining that undue delay or prejudice will not result, may permit relevant oral or written statements or both, by persons who are not parties or called by parties as witnesses. Limitations may be imposed on the length of such statements and cross-examination by the parties shall be permitted.

### **3.12 BURDEN OF PROOF**

(a) Where applicable ordinance(s) or other applicable law so provide, the Hearing Examiner shall accord deference or other presumption as directed by the applicable ordinance(s).

(b) Where the applicable ordinance(s) provide that the code enforcement defendant or appellant has the burden, defendant/appellant(s) must show by the applicable standard of proof that the Department's decision or action is not in compliance with the ordinance(s) authorizing that decision or action.

(c) Where the applicable ordinance(s) do not provide that the code enforcement defendant or appellant has the burden, the Department shall make a prima facie showing that its decision or action is in compliance with the ordinance(s) authorizing that decision or action.

(d) Unless otherwise provided by applicable ordinance(s), statute, or case law, the standard of proof is a preponderance of the evidence.

### **3.13 RECONSIDERATION**

(a) Reconsideration of a Hearing Examiner code enforcement decision may be granted by the Hearing Examiner to the extent consistent with state law, if a moving party demonstrates one or more of the following:

1. Irregularity in the proceedings by which the moving party was prevented from having a fair hearing;
2. Newly discovered evidence of a material nature that could not, with reasonable diligence, have been produced at hearing;
3. Error in the computation of the amount of damages or other monetary element of the decision;
4. Clear mistake as to a material fact.

(b) Motions for reconsideration must be filed within 10 days of the date of the Hearing Examiner's decision. Unless otherwise specifically provided by the applicable ordinance(s), the filing of a motion for reconsideration shall not stop or alter the running of the period provided to appeal the Hearing Examiner's decision.

### **3.14 SUBSEQUENT APPEAL**

Hearing Examiner decisions may be appealed as provided for in applicable law. Information regarding subsequent appeal opportunities shall be provided as a postscript on the Hearing Examiner decision.

## **SECTION 4: RECOMMENDATIONS TO COUNCIL**

In addition to the Rules of General Application in Section 2.0, the rules in Section 4 shall govern review of matters where the Hearing Examiner is to hold a public hearing and prepare a recommendation or final decision on land use permit applications or appeals of staff decisions on such applications.

### **4.01 NATURE AND PURPOSE OF PROCEEDINGS**

Public hearings shall generally be informal in nature, but conducted in such manner that the information and facts relevant to a particular proceeding will become the most readily and efficiently available to the Examiner. Irrelevant, immaterial, unreliable or unduly repetitious testimony, exhibits, or other information presented may be excluded by the Examiner.

### **4.02 RIGHTS OF PARTIES AND INTERESTED PERSONS**

Any party to a matter subject to a public hearing before the Hearing Examiner has the right to: to testify and present evidence; to ask questions of those testifying at hearing; and to receive a copy of the Hearing Examiner's recommendation or decision.

#### **4.03 FORMAT OF PUBLIC HEARING**

(a) A public hearing shall include, but need not be limited to, the following:

1. Examiner's introductory statement;
2. Report by the Director (including introduction of the official file, reference to exhibits, and a summary of the recommendation of the Department);
3. Testimony by the applicant or appellant;
4. Public comment in support of or in opposition to the application or appeal;
5. Opportunity for parties and Examiner to ask questions;
6. Opportunity for presentation of additional information as rebuttal.

(b) The Examiner may alter or modify the order of hearing if and as necessary to best provide for the presentation and understanding of information.

(c) Questions asked of citizens expressing their opinions shall generally be limited to clarification.

(d) Persons testifying as expert witnesses are subject to cross-examination.

**RULES OF PROCEDURE FOR  
PROCEEDINGS BEFORE THE HEARING EXAMINER  
OF THE CITY OF ISSAQUAH, WASHINGTON**

*NOTE: The following definitions apply to Chapters I and II of these rules. Please consult them when the following terms appear in the rules.*

**DEFINITIONS**

"IMC" means the Issaquah Municipal Code.

"Appellant" means a person, organization, association, or other similar group who files a complete and timely appeal of a decision or other appealable action in accordance with the IMC.

"Applicant" means a person who is the owner of the subject property or the authorized representative of the owner of the subject property, and who has applied for a land use permit.

"City" means the City of Issaquah, Washington.

"Clerk to the Hearing Examiner" means a person designated by the City to assist the Hearing Examiner in his/her duties.

"Closed record appeal" means an administrative appeal on the record to the Hearing Examiner, following an open record hearing on a project permit application when the appeal is on the record with no or limited new evidence or information allowed to be submitted and only appeal argument allowed.

"Ex parte communication" means written or oral communications to the Hearing Examiner about a matter pending before the Hearing Examiner, not included in the record and made outside of a hearing, but does not include communication of a purely procedural nature.

"Hearing Examiner" or "Examiner" means the Hearing Examiner or the Hearing Examiner Pro Tempore of the City of Issaquah.

"Interested Person" means any individual, partnership, corporation, association, or public or private organization of any character that may be affected by proceedings before the Hearing Examiner and shall include any party in a contested case. The City's administrative staff shall be considered an Interested Person and shall have the same rights as any other Interested Person.

"Motion" means an oral request during the course of a hearing or a written request made to the Hearing Examiner for an order or other ruling.

"Notice of Decision" means the written document of the Hearing Examiner that communicates a decision on an action before the Hearing Examiner.

"Open Record Appeal Hearing" means an administrative hearing that creates the record on appeal through written and oral testimony and submission of evidence and information.

"Order" means a written determination of the Hearing Examiner.

"Person" means any individual, firm, association, partnership, corporation or any entity, public or private.

"Party of record" means:

- a. A person who has testified at the open record hearing on the application and signed in at the hearing;
- b. The applicant, or applicant's representative;
- c. The subject property tax payer as identified by the records available from the King County assessor's office;
- d. A person submitting written testimony about a matter pending before the Examiner, excluding persons who have only signed petitions or mechanically produced form letters;
- e. The City's administrative staff; and
- f. A person who files a written request for Notice of Decision.

"Public Hearing" means a hearing with advance public notice, where the public is given the opportunity to provide written and oral testimony and the testimony is made part of the official project record. The hearing, conducted by the Hearing Examiner, creates the City's record through testimony and submission of evidence and information. An open record hearing may be held prior to the City's decision on a Project Permit to be known as an "open record predecision hearing."

"Public Meeting" means an informal meeting, hearing, workshop, or other public gathering of people to obtain comments from the public or other agencies on a proposed project permit prior to the local government's decision. A public meeting does not include an open record hearing. The proceedings at a public meeting may be recorded and a report or recommendation may be included in the local government's project permit application file.

"Record" means the oral testimony and written exhibits submitted at a hearing or the oral comments and written exhibits submitted at a meeting. The electronic recording of the proceeding shall be included as part of the record. At the discretion and order of the Hearing Examiner, the record may be supplemented after the closing of testimony.

"Staff Report" means the document prepared by the City planning staff.

"Working Day" means any day for which the City's offices are open.

**CHAPTER I:**  
**HEARINGS ON APPLICATIONS**

**SECTION 1.1: APPLICATION OF RULES**

This Chapter applies to open record hearings on land use applications.

**SECTION 1.2: JURISDICTION**

The Hearing Examiner's jurisdiction is limited to those issues where ordinance or other appropriate authority grants the Hearing Examiner the authority to hold hearings, make decisions or recommendations, and issue orders.

**SECTION 1.3: EX PARTE COMMUNICATION**

- 1.3.1 No person, nor his or her agent, employee, or representative, who is interested in a particular petition or application currently pending before the Examiner shall communicate ex parte, directly or indirectly, with the Hearing Examiner concerning the merits of that or a related petition or application. This rule shall not prohibit ex parte communication concerning procedural matters.
- 1.3.2 The Examiner shall not communicate ex parte directly or indirectly with any interested person, nor his or her agent, employee, or representative, with regard to the merits of a petition or application that is pending before the Examiner.
- 1.3.3 If prohibited ex parte communication is made to or by the Examiner, such communication shall be publicly disclosed, and proper discretion shall be exercised by the Examiner on whether to disqualify himself or herself as Examiner for that particular hearing.

**SECTION 1.4: NATURE OF PROCEEDINGS**

- 1.4.1 Expeditious Proceedings  
It is the policy of the Office of the Hearing Examiner that, to the extent practicable and consistent with requirements of law, hearings shall be conducted expeditiously.
- 1.4.2 Frequency  
Hearings will be scheduled through the Clerk to the Hearing Examiner in coordination with the Hearing Examiner. There may be more than one case scheduled to commence at the same time, and in such event the Hearing Examiner shall have discretion in setting the agenda.
- 1.4.3 Format  
The format for a hearing will be designed in such a way that the evidence and facts relevant to a particular proceeding become available to the Hearing Examiner and easily ascertainable by a reviewing body.
- 1.4.4 Record of Hearing  
a. Hearings shall be electronically recorded and such recordings shall be a part of the record. No minutes of the hearing will be kept. Copies of the electronic recordings of a particular proceeding shall be made available to the public if requested. The requester shall pay the reasonable cost of such copying.

- b. Copies of any written materials in the record may be obtained by any person who shall be responsible for paying the cost of reproducing such material.

1.4.5 Computation of Time

Computation of any period of time prescribed or allowed by these rules, ordinances of the City of Issaquah, and laws of the State of Washington shall begin with the first day following that on which the act or event initiating such period of time shall have occurred. When the last day of the period so computed is a Saturday, Sunday, or a national, state, or City holiday, the period shall run until the end of the next following working day.

SECTION 1.5: RIGHTS AND RESPONSIBILITIES OF PARTIES

1.5.1 Rights of City

The City staff shall have the right to present evidence and testimony, object, and make motions, arguments, recommendations, and all other rights essential to a fair hearing.

1.5.2 Rights of Applicant

Every applicant shall have the right of notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing. Further, the applicant shall have the right to timely access to the City staff report.

The Hearing Examiner may limit the time allowed to parties testifying on an equal basis, may establish time limits for initial or rebuttal evidence, and may limit the number of witnesses to be heard. Cross-examination is permitted as necessary for a full disclosure of the facts, but the Hearing Examiner shall control the amount and style of cross-examination.

1.5.3 Rights of Parties of Record

Every party of record shall have the right to present evidence and testimony at hearings. The right of persons to cross-examine, object, and submit motions and arguments shall be at the discretion of the Hearing Examiner. The Hearing Examiner may impose reasonable limitations on the number of witnesses heard, and the nature and length of their testimony.

1.5.4 Responsibilities of City Staff

The City staff shall provide a report consistent with the provisions of Rule 7.6, provide notice of hearings, present materials at the hearings, and provide documentation relevant to the case. Staff reports should be available to the public at least five working days before the hearing.

1.5.5 Responsibilities of Applicant

Whenever possible the applicant shall provide the Hearing Examiner with material that supports his or her application prior to the hearing, be prepared for questions by the Hearing Examiner, and treat all who participate in these proceedings courteously. All supporting materials shall be provided to the Hearing Examiner a minimum of five working days before the hearing.

1.5.6 Responsibilities of All Participants, Witness and Observers

Parties, witnesses, or observers shall conduct themselves with civility and deal courteously with all who participate in the proceedings. Failure to do so will result in removal from the hearing at the discretion of the Hearing Examiner.

SECTION 1.6: PRESIDING OFFICIALS

1.6.1 Presiding Officials

- a. The Hearing Examiner shall preside over the hearings.
- b. The Hearing Examiner shall have all of the authority and duties as granted to him or her in state statutes, the IMC, and other local ordinances. Included in the duties of the Hearing Examiner are the following: to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. He or she shall have all powers necessary to perform his functions, including the following:
  1. To administer oaths and affirmations;
  2. To issue subpoenas;
  3. To rule upon offers of proof and receive evidence;
  4. To regulate the course of the hearings and the conduct of the parties and their agents;
  5. To question any party presenting testimony at the hearing;
  6. To hold conferences for settlement, simplification of the issues, or any other proper purpose;
  7. To require briefs on legal issues;
  8. To consider and rule upon all procedural and other motions appropriate to the proceedings; and
  9. To make and file recommendations or decisions.
- c. In the performance of his or her adjudicative functions, the Hearing Examiner shall not be subject to the supervision or direction of any elected official, officer, employee or agent of the City.

1.6.2 Presence of Legal Counsel at Hearings or Public Meetings

- a. All parties participating in the hearings may be represented at the hearings by legal counsel of their choice.
- b. Attorneys engaged in the representation of clients before the Hearing Examiner shall conduct themselves in accordance with all applicable Rules of Professional Conduct, including the display of courtesy to other members of the bar, witnesses, and all other persons present in the hearing room.

SECTION 1.7: CONDUCT OF HEARINGS

1.7.1 Notice Requirements of Hearings and Filings

- a. All notice, time requirements, and methods of notification shall be consistent with the provisions as set forth in the IMC, in addition to the provisions of this Section.

- b. Affidavit of Notice: An affidavit attesting to the notice given of a hearing (including dates and places of publication, and list of addressees) shall be provided by the City and made part of each record.

1.7.2 Oath or Affirmation

All testimony before the Hearing Examiner shall be given under oath or affirmation to tell the truth.

An interpreter acting on behalf of any interested person shall take an oath that a true interpretation of the interested person's testimony shall be made.

1.7.3 Content of the Record

The record of a hearing conducted by the Hearing Examiner shall include the following materials:

- a. The application or petition;
- b. The departmental staff reports;
- c. All evidence received, which shall include oral testimony given at the hearing, all exhibits, other materials admitted as evidence, and any written material submitted pursuant to Hearing Examiner order;
- d. A statement of all materials officially noticed;
- e. A decision or a recommendation containing the findings and conclusions of the Hearing Examiner;
- f. Recordings made on electronic equipment; and
- g. An environmental determination made pursuant to the State Environmental Policy Act of 1971, if applicable.

1.7.4 Development of Record

A hearing usually will follow this order of procedure:

- a. Hearing Examiner's introductory statement.
- b. A report by the departmental staff that may include introduction of the request, reference to visual aids, and a summary of the recommendation of the department;
- c. Testimony by the applicant or petitioner, and cross-examination of the witnesses;
- d. Testimony of interested parties;
- e. Opportunity for cross-examination and rebuttal; and

- f. An opportunity for questions by the Hearing Examiner.

#### 1.7.5 Content and Form of Staff Reports

The City staff report on a land use application should include the following, if relevant to the application:

- a. A list of the names and addresses of the owner and applicant of the subject property and his/her property interest in the property that is the subject of the hearing.
- b. A brief summary of the requested action and the citation of the ordinance controlling the request.
- c. A common description of the subject property and a reference to the legal description of the subject property.
- d. A summary of the Comprehensive Plan designation and zoning designation of the subject property; the current development of the subject property and the adjoining properties; topographical information; geological and soils information; information on the vegetation on the property; and any other relevant scientific, environmental or engineering information.
- e. A history of the requested action and a history and vicinity map of the development in the surrounding properties.
- f. A summary of the reports or recommendations of any other agencies consulted.
- g. Appropriate maps of the subject property.
- h. The result of the determination pursuant to the State Environmental Policy Act.
- i. Staff's recommendations.

The staff report shall be filed with the Hearing Examiner at least five working days prior to the scheduled hearing and copies provided to the applicant and made available to the public.

#### 1.7.6 Continuances of Hearings

##### a. Hearing Examiner

If the Hearing examiner finds that more information is necessary in order to make a decision or recommendation, or he or she is unable to hear all of the public comments on the matter, the hearing may be continued to a specified date. If the hearing is continued to a specific date, time, and place, at a hearing, or if notice is posted on the door of the hearing room before a noticed hearing begins, no further notice of the hearing need be given.

##### b. At the Request of a Party

Any party of record may request continuance of a hearing. The request, if made prior to the hearing, must be in writing and state reasonable grounds for a

continuance. If the request is made orally at the hearing it must be based on reasonable grounds. The Hearing Examiner shall have discretion to grant or deny the request for continuance.

1.7.7 Evidence

- a. Burden of proof. In each proceeding, the applicant shall have the burden of proof to show compliance with applicable laws and regulations of Washington State and the City of Issaquah.
- b. Admissibility. The hearing generally will not be conducted in strict adherence to Rules of Evidence. Any relevant evidence shall be admitted if it is the type that possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. The Hearing Examiner shall have discretion on the admissibility of all evidence.
- c. Copies. Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original. It is advisable to provide extra copies of all documents to the Hearing Examiner.
- d. Occasionally, the Hearing Examiner may request a document to be filed after the close of public testimony. Only those documents referred to at the hearing may be submitted and only those specifically requested by the Hearing Examiner. Additional evidence may only be submitted upon a Request for Reconsideration based on new evidence not reasonably available at the time of the hearing. If additional evidence is submitted with a Request for Reconsideration, it will be considered only upon a showing of significant relevance and good cause for delay in its submission.

SECTION 1.8: WITHDRAWAL OF APPLICATION

1.8.1 Withdrawal Prior to Service of Notice

If a withdrawal request is made before official notice of the hearing is given, the applicant or petitioner shall notify the City of the withdrawal request and the withdrawal shall be automatically permitted.

1.8.2 Withdrawal Made Any Other Time

Withdrawal requests made at any time other than that mentioned in Sec. 1.8.1, the Clerk to the Hearing Examiner shall post a notice of withdrawal and cancellation of application hearing on the hearing room door on the date of hearing.

SECTION 1.9: DECISIONS AND RECOMMENDATIONS

1.9.1 Written Decisions or Recommendation

For permits on which the Hearing Examiner has final approval authority, a written report of findings, conclusions, and decision shall be sent to all parties of record. The Hearing Examiner's decision or recommendation shall be submitted within ten working days following the conclusion of all testimony and hearings, unless a longer period is agreed to by the Applicant.

1.9.2 Content of Decision or Recommendation

A decision or recommendation shall include a statement of:

- a. Findings. The findings shall be based exclusively on the evidence presented in the hearing and those matters officially noticed.
- b. Conclusions. Conclusions shall include a determination of whether application approval criteria have been met, and whether conditions of approval are necessary in order for an application to comply with approval criteria.
- c. The appropriate decision, recommendation or order. The decision, recommendation or order shall be based upon a consideration of the whole record and supported by substantial evidence.

1.9.3 Procedure for Reopening Hearing

At any time prior to the filing of the final decision or recommendation, the Hearing Examiner may reopen the proceeding for the reception of further evidence. All parties of record who participate at the hearing shall be given notice of the consideration of such evidence and granted an opportunity to review such evidence.

SECTION 1.10: RECONSIDERATION

1.10.1 Reconsideration of the decision may be granted by the Hearing Examiner on a showing of one or more of the following:

- a. A substantial change in circumstances affecting the subject property;
- b. Newly discovered evidence of a material nature which could not, with reasonable diligence, have been produced at hearing; and
- c. Clear mistake as to a material fact.

1.10.2 Each party is limited to one Motion for Reconsideration, even though the original decision may be subsequently reversed or modified.

1.10.3 A Motion for Reconsideration must be filed within ten working days of the date of the Hearing Examiner's decision. Unless otherwise specifically provided by the applicable ordinance(s), the filing of a Motion for Reconsideration shall not stop the period provided to appeal the Hearing Examiner's decision.

1.10.4 No party may file a response to a Motion for Reconsideration except at the request of the Hearing Examiner.

1.10.5 Reconsideration will not be granted to review prehearing orders.

SECTION 1.11: APPEALS OF DECISIONS

When the Hearing Examiner has issued a decision and all reconsideration periods and any administrative appeals have expired, the decision shall be final and may be appealed only to

King County Superior Court within twenty-one calendar days from the date of the final decision.  
See, *RCW 36.70C*.

SECTION 1.12: CONFLICTS

These Rules of Procedure are adopted to supplement the requirements set forth in the IMC.  
Any conflict between the rules and the provisions of the IMC will be decided consistent with the provisions of the IMC.

**CHAPTER II:**  
**RULES OF APPEAL OF ADMINISTRATIVE DECISIONS**

**SECTION 2.1: APPLICATION OF RULES**

This chapter applies to appeals of administrative decisions.

**SECTION 2.2: JURISDICTION**

The Hearing Examiner's jurisdiction is limited to those issues where ordinance or other appropriate authority grants the Hearing Examiner the authority to hold hearings, make decisions or recommendations, and issue orders.

**SECTION 2.3: EX PARTE COMMUNICATION**

- 2.3.1 No person, nor his or her agent, employee, or representative, who is interested in a particular petition or application currently pending before the Examiner shall communicate ex parte, directly or indirectly, with the Hearing Examiner concerning the merits of that or a related petition or application. This rule shall not prohibit ex parte communication concerning procedural matters.
- 2.3.2 The Examiner shall not communicate ex parte directly or indirectly with any interested person, nor his or her agent, employee, or representative, with regard to the merits of a petition or application that is pending before the Examiner.
- 2.3.3 If prohibited ex parte communication is made to or by the Examiner, such communication shall be publicly disclosed, and proper discretion shall be exercised by the Examiner on whether to disqualify himself or herself as Examiner for that particular hearing.

**SECTION 2.4: NATURE OF PROCEEDINGS**

- 2.4.1 **Expeditious Proceedings**  
It is the policy of the Office of the Hearing Examiner that, to the extent practicable and consistent with requirements of law, hearings shall be conducted expeditiously.

**SECTION 2.5: FILING**

- 2.5.1 **Compliance with Rules**  
All appeals must comply with the Rules and with the requirements established in the applicable IMC ordinance under which the appeal is filed.
- 2.5.2 **Timeliness**  
To be considered timely, an appeal from an administrative decision must be received no later than 5:00 PM on the last day of the appeal period. Such an appeal must be filed with the clerk of the City of Issaquah.
- 2.5.3 **Fee**  
Appeals shall be accompanied by the appropriate filing fee as required by the IMC Fee Schedule.

#### 2.5.4 Contents

An appeal must be in writing and contain the following:

- a. A brief statement as to how the appellant is significantly affected by or interested in the matter appealed;
- b. A brief statement of the appellant's issues on appeal, noting appellant's specific exceptions and objections to the decision or action being appealed;
- c. The specific relief requested, such as reversal or modification; and
- d. Signature, mailing and email addresses, and phone number of the appellant, and name and address of appellant's designated representative, if any.

#### 2.5.5 Briefs

Briefs or other memoranda of law may be submitted by the parties in support of or in response to an appeal. Each party is permitted one primary brief not exceeding fifteen double-spaced pages in length. In addition, the appellant may submit a reply brief not exceeding ten pages in length. The Hearing Examiner may, at his or her discretion, waive or modify these page limits at the request of a party in order to accommodate complex legal and factual issues. Submission of briefs should be submitted by the date set out in a Pre-Hearing Order, if issued by the Hearing Examiner, or at least five days prior to the hearing. Briefs must be limited to the specific issues set forth in the appellant's statement of appeal.

#### 2.5.6 Motions

Motions and responses to motions are not to exceed fifteen double-spaced pages in length without prior approval of the Hearing Examiner.

#### 2.5.7 Proposed Findings and Conclusions

The Hearing Examiner may request proposed findings and conclusions to be submitted at the option of the parties.

### SECTION 2.6: DISMISSAL

- 2.6.1 An appeal may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief, or it is without merit on its face, frivolous, or brought merely to secure delay.
- 2.6.2 Any party may request dismissal of all or part of an appeal as a motion by the deadline set out in the Pre-Hearing Order with notice to all parties. The Hearing Examiner may make a ruling on a motion to dismiss based upon written arguments or may call for oral arguments.
- 2.6.3 When decision or action being appealed is withdrawn by the issuing department, or when the appellant withdraws the appeal, the appeal becomes moot and shall be dismissed.

### SECTION 2.7: PREHEARING CONFERENCE

- 2.7.1 The Hearing Examiner may issue prehearing orders or, with the consent of the parties, hold a conference prior to the hearing for the purpose of:
- a. Identification, clarification, and simplification of the issues;
  - b. Disclosure of witnesses to be called and exhibits to be presented;
  - c. Hearing and deciding motions; and
  - d. Other matters deemed by the Hearing Examiner appropriate for the orderly and expeditious disposition of the proceedings.
- 2.7.2 At the hearing the Hearing Examiner shall develop for the record the time, purpose and result of the conference. If any orders have been issued they will be part of the record.
- 2.7.3 Prehearing orders may not be appealed until the Hearing Examiner issues an appeal decision.

### SECTION 2.8: WITHDRAWAL

- 2.8.1 Only the appellant may withdraw an appeal.
- 2.8.2 Where an appeal is made by several persons, a group, organization, corporation, or other entity, withdrawal shall be made by the person who had been designated as the party representative.
- 2.8.3 An appellant's Request to Withdraw shall be granted as a matter of right and the appeal dismissed.

### SECTION 2.9: PARTY REPRESENTATIVE

When a party consists of more than one individual, or is a group, organization, corporation, or other entity, the party shall designate an individual to be its representative and inform the Clerk to the Hearing Examiner of the name, address, and telephone number of the designated representative. The rights of such an appellant shall be exercised by the person designated as the party representative. Notice or other communication to the party representative is considered to be notice or communication to party.

### SECTION 2.10: NOTICE OF HEARING

2.10.1 All notice, time requirements, and methods of notification shall be consistent with the provisions set forth in the IMC. Normally, only parties to an appeal need to be notified, as there is no public comment at appeal hearings.

### SECTION 2.11: PARTIES' RIGHTS AND RESPONSIBILITIES

- 2.11.1 Although appellants and applicants have the right to be represented by an attorney, representation by an attorney is not required.
- 2.11.2 Where a party has designated a representative, the representative shall exercise the rights of the party.

2.11.3 Parties, witnesses, and observers shall conduct themselves with civility and deal courteously with all who participate in the proceedings. Failure to do so will result in removal from the hearing at the discretion of the Hearing Examiner.

#### SECTION 2.12: DEFAULT

The Hearing Examiner may dismiss an appeal by an Order of Default where the appellant, without good cause, fails to appear or is unprepared to proceed at a scheduled and properly noticed hearing.

#### SECTION 2.13: HEARING FORMAT

2.13.1 Appeal hearings, although generally informal in nature, shall have a structured format and shall be conducted in a manner deemed by the Hearing Examiner to make the relevant evidence most readily and efficiently available to the Hearing Examiner and to provide the parties a fair opportunity for hearing.

2.13.2 The order of an appeal hearing will generally be as follows:

- a. Hearing Examiner's introductory statement;
- b. Appellant's argument;
- c. Department's presentation;
- d. Applicant's presentation;
- e. Rebuttal; and
- g. Closing argument of parties.

2.13.3 Notwithstanding the provisions of the IMC, the order of hearing may be modified or a different order established as the Hearing Examiner deems necessary for a clear and fair presentation. The order of the hearing may also be modified as agreed upon by the parties, with the Hearing Examiner's approval.

#### SECTION 2.14: HEARING EXAMINER'S DECISION

A decision of the Hearing Examiner shall normally be issued within ten working days of the appeal hearing and include the following:

- a. Findings. The individual facts that the Hearing Examiner finds relevant, credible, and requisite to the decision, based on the record of proceedings.
- b. Conclusions. Legal and factual conclusions based upon specific findings of fact.
- c. Decision. The Hearing Examiner's decision as to the outcome of the appeal (affirm, modify, or reverse) based upon a consideration of the whole record and supported by substantial evidence in the record.

#### SECTION 2.15: RECORD

Normally, the record of an appeal shall include:

- a. The decision being appealed;
- b. The appeal statement;
- c. All evidence received which shall include oral testimony given at the hearing, all exhibits, and other materials admitted as evidence;
- d. A decision or a recommended decision containing the findings and conclusions of the Hearing Examiner;
- e. Recordings made on electronic equipment; and
- f. An environmental determination made pursuant to the State Environmental Policy Act of 1971, if applicable.

#### SECTION 2.16: RECONSIDERATION

2.16.1 Reconsideration of the appeal decision may be granted by the Hearing Examiner on a showing of one or more of the following:

- a. A substantial change in circumstances affecting the subject property;
- b. Newly discovered evidence of a material nature which could not, with reasonable diligence, have been produced at hearing; and
- c. Clear mistake as to a material fact.

2.16.2 Each party is limited to one Motion for Reconsideration, even though the original decision may be subsequently reversed or modified.

2.16.3 A Motion for Reconsideration must be filed within ten working days of the date of the Hearing Examiner's decision on the appeal. Unless otherwise specifically provided by the applicable ordinance(s), the filing of a Motion for Reconsideration shall not stop the period provided to appeal the Hearing Examiner's decision.

2.16.4 No party may file a response to a Motion for Reconsideration except at the request of the Hearing Examiner.

2.16.5 Reconsideration will not be granted to review prehearing orders.

# HILLIER, SCHEIBMEIR, KELLY & SATTERFIELD, P.S.

MARK C. SCHEIBMEIR  
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WILLIAM T. HILLIER  
Retired

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ERIN L. HILLIER  
SAMUEL D. SATTERFIELD

MICHAEL P. ROEWE  
In Memoriam

January 11, 2022

VIA EMAIL ([tsmith@ci.olympia.wa.us](mailto:tsmith@ci.olympia.wa.us))

Mr. Tim Smith  
Planning & Engineering Manager  
City of Olympia  
601 4th Avenue East  
Olympia, Washington 98501

Re: Hearing Examiner Position

Dear Tim:

This letter is in response to the City's recent RFQ for the position of Hearing Examiner. I would like to continue in the role as the City's Hearing Examiner and am submitting the enclosed materials in response to the RFQ.

As you know, I have been serving as Olympia's Hearing Examiner for the past nine years, since 2013. As the current Hearing Examiner, I am uncertain as to how much additional information you feel is necessary. I am therefore lessening my responses knowing that the City is well aware of my work. For similar reasons, my listed references exclude any Olympia officials and my attached decisions exclude any Olympia decisions. I trust that all of this makes sense. Should my proposal fail to include any of the requested information, please let me know and I will promptly supplement.

In advance, thank you for your consideration of my proposal.

Very truly yours,

HILLIER, SCHEIBMEIR,  
KELLY & SATTERFIELD, P.S.

By

  
Mark C. Scheibmeir  
[mark@centerstlaw.com](mailto:mark@centerstlaw.com)

## **SUMMARY OF QUALIFICATIONS, EXPERIENCE AND AVAILABILITY**

### **A. CV OF ACADEMIC AND PROFESSIONAL QUALIFICATIONS**

Bachelor of Science in Business Administration (with honors) from the University of Kansas in 1978.

Law Degree from the University of Washington Law School in 1981.

Private law practice in Chehalis, Washington from 1981 to the present, or 41 years.

#### **Hearing Examiner Experience**

Hearing Examiner for Lewis County since the position was created in 1996, or 26 years.

Hearing Examiner for Cowlitz County since 2007.

Hearing Examiner for the City of Olympia since 2013.

Hearing Examiner for Cities of Black Diamond and Yelm commencing late 2021.

Also Hearing Examiner for the Cities of Kelso, Castle Rock, and Elma, and the Towns of Cathlamet and Vader.

#### **Additional Background Information**

I have been practicing law in Chehalis since 1981, or for the past 41 years. In addition to my work as Hearing Examiner, my practice centers on real estate, business and estate planning matters. I have been involved in community activities throughout my professional career, including nearly 30 years of service on the Centralia College Foundation. In 2017 I was appointed by Governor Inslee as a Trustee for Centralia College and am currently in my second 5-year term as Trustee.

### **B. PREVIOUS EXPERIENCE CONDUCTING PUBLIC HEARINGS RELATING TO LAND USE REGULATIONS**

In 1996, Lewis County established the position of Hearing Examiner and I was selected for the position. I have served as the County's Hearing Examiner ever since, or for twenty-six years. My role has expanded over the years to include appeals of dangerous animal notifications as well as appeals relating to the Health Department and Sanitary Code.

In 2007, I became Hearing Examiner for Cowlitz County and have conducted hearings for Shorelines Substantial Development Permits for two nationally-recognized projects: The

Millennium Coal Port proposed for Longview, and the Northwest Innovations Methanol Plant proposed for Kalama.

In 2013, I was selected as Hearing Examiner for the City of Olympia. Since then I have presided over a number of complex, often controversial, land use issues including several new subdivisions and a number of mixed-use projects in the downtown area. The City's land use regulations allow the Director to transfer decision-making authority to me for highly complex or controversial projects including the "Views on 5th" project.

Following the recent retirement of the Hearing Examiner for several cities in Thurston and Pierce Counties, I was asked by two of those cities, Black Diamond and Yelm, to serve as their Hearing Examiner. I am currently under consideration for appointment in one or more similar cities.

As earlier noted, I am also Hearing Examiner for several small cities including Kelso, Castle Rock, Cathlamet and Vader.

It is perhaps important to add that in 26 years of work as a Hearings Examiner I have not had a decision overturned on appeal, including several that have reached the Court of Appeals.

### **C. PREVIOUS EXPERIENCE WITH EVALUATION CRITERIA**

#### Criteria 1.

- I have 41 years of legal experience, with more than 26 years' experience as a Hearing Examiner.
- I have presided over hundreds of hearings relating to land use planning. Many of these hearings have been extremely complex and/or controversial, involving difficult legal issues and significant public participation.
- I am responsible for development project review in all of the jurisdictions I serve. This authority includes master plan development, subdivisions and mixed-use projects.
- I am intimately familiar with the Growth Management Act and its application to development in both cities and counties.
- I am quite familiar with SEPA and have conducted numerous SEPA-related hearings.
- I am responsible for subdivision approval in the City of Olympia as well as in other jurisdictions I serve.

- I am very familiar with the Shoreline Management Act (SMA) and the Shoreline Master Program (SMP) of Olympia as well as the other SMP's jurisdictions I am currently involved with. As earlier noted, my Shoreline Decisions for the Millennium Bulk Terminal Port in Longview and the Kalama Methanol Plant received national attention.

- I am familiar with the design review process and, in particular, the Olympia design review process.

- As previously noted, I have conducted hundreds of hearings relating to land use; have established rules and procedures for those hearings; and have been responsible for the orderly management of hearings that, on occasion, have involved several hundred participants.

- I have significant experience addressing public utilities, engineering and transportation issues, and have reviewed countless Traffic Impact Analyses.

- I am familiar with impact fees, including Olympia's. My decision in the Douglass Properties appeal involved a thorough analysis of Olympia's impact fees. My decision was subsequently affirmed by the Washington State Court of Appeals.

- I am fully aware of the constitutional principles involved in land use including, in particular, those relating to Substantive Due Process, Standing and the Vested Rights Doctrine.

Criteria 2. I would invite the City to review my previous land use decisions for the City as evidence of my legal writing ability. As earlier noted, in more than 26 years of work as a Hearing Examiner I have not had a decision overturned on appeal. I hope that this speaks to the clarity of my legal writing and the strength of my legal analysis.

Criteria 3-5. I have been involved in land use hearings with as many as 500 participants and thousands of exhibits, and with decisions running 100 pages or more in length. Even in such complex hearings I have managed to control the hearing and render a written decision within the allowed time. I have adjusted my hearing procedures to best accommodate the challenges associated with Covid. I am equally comfortable in conducting either in-person or remote hearings, understanding that the primary goal is to ensure that every participant is given a full opportunity to be heard.

Criteria 6. As evidenced by my prior work for the City, I am available at all days and times preferred by the City for its hearings. I am very familiar with all of the City's staff and its hearing protocols. I am also familiar with the City's current rules and procedures (having prepared them).

Criteria 7. I have been licensed to practice law in the State of Washington since 1981, or 41 years.

Criteria 8. My references are as follows:

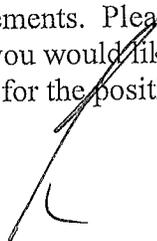
1. Lee Napier, Lewis County Community Development Director.  
Telephone: (360) 740-2606.
2. Greta Holmstrom, Interim Director of Planning for Cowlitz County.  
Telephone (360)577-3052 (ext. 6676).

**D. RECENT WRITTEN DECISIONS**

I am enclosing two recent written decisions, one from Lewis County and one from Cowlitz County. I have selected these decisions as they involve somewhat controversial projects with notable public participation. The Lewis County matter involves an application by the County for a Shorelines Substantial Development Permit to establish a County-owned park along the Cowlitz River near Packwood to allow a put-in location for kayakers on the upper Cowlitz (approved). The Cowlitz County matter involves an after-the-fact variance to resolve conflicts between a marijuana manufacturing facility and an adjoining historic cemetery (approved). An invoice for the Cowlitz County matter is attached. I am paid a monthly retainer from Lewis County and therefore do not have a separate invoice for the individual hearings.

**SUMMARY**

I hope that I have responded to all of the RFQ requirements. Please let me know if there is any additional information you need or any other matters you would like to discuss. In advance, thank you for your consideration of my application for the position of Hearing Examiner.

  
\_\_\_\_\_  
Mark C. Scheibmeir

## METHOD AND APPROACH

I will attempt to make this statement of my method and approach as non-repetitive of other materials as possible. I apologize for any overlap.

I have served as a Hearing Examiner for more than 26 years for both counties and cities, and cities both large and small. While there are common threads in the land use planning of all of these jurisdictions, each has its own approach and vision. It has been my goal to render decisions reflecting the jurisdiction's vision of its land use, not my own. To that end, my decisions may at times seem progressive while at other times less so depending on the jurisdiction's Comprehensive Plan, Development Regulations, Shoreline Master Program, etc.

As an appointed Hearing Examiner, I recognize that I have not been elected to the position and have not been empowered to establish land use policy, as this role is reserved to the elected governing body. My role is limited to applying the received facts to the Comprehensive Plan and Development Regulations enacted by the governing body. At times, members of the public would prefer that I expand my role and that I be more responsive to their wishes - especially when those wishes are expressed in large numbers - but I have respectfully declined, as to do so would usurp the role of elected officials.

I have been practicing law for more than 40 years. While my private practice involves some representation of small businesses, much of my other work involves assisting individuals with their real estate issues. This other, non-hearing examiner work offers me a unique perspective on the consequences of land use decisions. I fully understand how approving or denying a proposed land use has rippling effects across neighboring properties, neighborhoods, and the community as a whole. In particular, I realize that for most individuals their home is their most significant asset and that my decision may affect the value of that asset. I strive to never forget this.

Land use hearings, and land use decisions, are only effective if all of the participants believe they have an equal right to be heard and that their concerns are fully considered. It is simply not possible to render decisions that please all interested parties, but it is possible to render decisions that leave the participants believing they have been given a fair opportunity to be heard. It has been, and remains, my goal to conduct hearings that achieve this result while carving out the jurisdiction's vision of its land use.

# **LEWIS COUNTY DECISION**

BEFORE THE LEWIS COUNTY HEARINGS EXAMINER

IN RE:	)	HEARING NO. 20-2-001
COWLITZ RIVER PUBLIC ACCESS POINT	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION APPROVING PERMITS
LEWIS COUNTY PUBLIC WORKS,	)	
Applicant.	)	

**APPLICANT:** Lewis County Public Works

**REPRESENTATIVES:** Ann Weckback  
Environmental Planner

Cullen Gatten  
Lewis County Prosecuting Attorney's Office

**Summary of Request:** A Shoreline Substantial Development Permit and Shoreline Conditional Use Permit to establish a public day use area along the Cowlitz River near Packwood for recreational activity. The proposed construction includes a 24-foot wide gravel access road to the parking area; a gravel parking area with 21 single vehicle stalls and 17 stalls for vehicles with trailers; a double stall ADA-accessible precast concrete vault toilet within a 240-square foot building; nonmotorized kayak/canoe/boat access; a 35-foot log stringer pedestrian bridge and a loop gravel pathway providing access to the river. Possible additional improvements include future paving of the parking area and access road. The project also includes installation of interpretive signs, cutting/filling and tree removal and replacement.

**Location of Proposal:** 105 Alta Drive, Packwood, Washington (Mile Post 0.04520,055) in Sections 15 and 16, Township 13 North, Range 9 East, W.M., Tax Parcel Nos. 035132-005-005 and 035147-001-001.

**Summary of Decision:** The Shoreline Substantial Development and Shoreline Conditional Use Permits are **approved** subject to amended conditions.

**BACKGROUND**

There is limited public access to the upper Cowlitz River above Lake Scanewa and no public access in the Packwood area, although fishers and kayakers often find means of access either by the permission of private landowners or unpermitted access through public lands. Several years ago, discussions got underway over the possible use of a County-owned

*Findings of Fact, Conclusions of Law and Decision Approving Permits - 1*

**LEWIS COUNTY HEARING EXAMINER**  
299 N.W. CENTER ST. / P.O. BOX 939  
CHEHALIS, WASHINGTON 98532  
Phone: 360-748-3386/Fax: 748-3387

1 property along the Cowlitz River, and just upriver from the Skate Creek Bridge, for use as public  
2 access to the river for fishing and kayaking. This ultimately led to discussions between Lewis  
3 County and the Destination Packwood Association which, in turn, led to application for funding.

4 At some point in this process Destination Packwood was dissolved, leaving a void in  
5 local participation in the project. That void was subsequently filled by a new volunteer  
6 organization, the Packwood Improvement Club ("PIC") which has entered into an agreement  
7 with Lewis County (the "Memorandum of Agreement" or "MOA") to manage the facility should  
8 it receive all of its necessary permits and be constructed.

9 The project proposes to establish a day use recreational area on the County-owned  
10 property along the Cowlitz River to allow public access for fishing, kayaking and other  
11 recreational access. The primary components of the project are a graveled entrance road,  
12 graveled parking area, vault toilets, graveled pathway to the river including a suspension bridge  
13 over an overflow channel of the river, and informal access point between existing protective rock  
14 barriers for non-motorized boats and kayaks to put into the river.

15 The project has divided the local population. It is supported by fishing, boating and  
16 recreational interests, and at least some of the Packwood business community, but opposed by  
17 adjoining and nearby residential neighborhoods who are concerned about potential impacts of the  
18 project on their private properties. Their concerns include impacts to property values; trespass;  
19 noise; other nuisances; trash; public safety; aesthetics; wildlife impacts; and possible increased  
20 impacts from flooding.

21 One of the unusual aspects of this project is that the County-owned facility would be  
22 operated and maintained by the volunteer PIC. PIC would be responsible for managing garbage,  
23 maintaining the premises, cleaning the toilets, closing and locking the facility at night, and  
24 otherwise being responsible for the facility's operation. Opponents are concerned that PIC will  
25 not be able to fulfill its responsibilities.

*Findings of Fact, Conclusions of  
Law and Decision Approving  
Permits - 2*

LEWIS COUNTY HEARING EXAMINER  
299 N.W. CENTER ST. / P.O. BOX 939  
CHEHALIS, WASHINGTON 98532  
Phone: 360-748-3386/Fax: 748-3387

1 If this project is to go forward it must obtain various permits and other regulatory  
2 approvals, but the only permits before the Hearing Examiner are the Shorelines Permits. The  
3 project requires a Shorelines Substantial Development Permit for construction of all of the  
4 proposed improvements with the exception of the pedestrian suspension bridge, which requires a  
5 Shorelines Conditional Use Permit.

6 When this matter was first submitted to the Hearing Examiner for the Shorelines Permits  
7 there was a concurrent appeal of the SEPA Determination by Chris Murphy. Subsequently Mr.  
8 Murphy withdrew his SEPA Appeal, leaving only the Shorelines Permits before the Hearing  
9 Examiner.

10 The matter awaited public hearing before the Hearing Examiner for several months as a  
11 result of the many challenges posed by the Covid-19 pandemic and the resulting restrictions on  
12 public gatherings. These restrictions led to several continuances of the scheduled hearing and,  
13 ultimately, a decision to hold the public hearing remotely rather than in person.

#### 14 PUBLIC HEARING

15 The application by Lewis County Public Works was submitted to the Hearing Examiner  
16 for a public hearing on the Shoreline Permits in April. At or about the same time, Chris Murphy  
17 submitted an appeal of the SEPA Determination. In keeping with land use regulations, the two  
18 matters were combined into a single hearing on a date to be determined in accordance with  
19 public health restrictions due to the ongoing Covid-10 pandemic. Mr. Murphy ultimately  
20 decided to withdraw his appeal of the SEPA Determination, leaving only the public hearing for  
21 the Shoreline Permits. A public hearing date of June 30, 2020 was scheduled but then stricken.  
22 A new hearing date of September 29, 2020, was ultimately agreed upon by the parties, leaving  
23 only the question of whether the hearing would be in person or done remotely. As the hearing  
24 date neared and the pandemic failed to abate it was concluded that the hearing should take place  
25 remotely.

*Findings of Fact, Conclusions of  
Law and Decision Approving  
Permits - 3*

**LEWIS COUNTY HEARING EXAMINER**  
299 N.W. CENTER ST. / P.O. BOX 939  
CHEHALIS, WASHINGTON 98532  
Phone: 360-748-3386/Fax: 748-3387

1 Utilizing the Zoom platform, supplemented by telephone access, the public hearing  
2 commenced at 10:30 a.m. on September 29, 2020. Zoom Webinar was utilized to regulate input  
3 (that is, to mute all participants except the person authorized to speak by the Hearing Examiner).  
4 Notice that the hearing would be held remotely was provided in advance of the hearing and all  
5 interested parties were given a link to the Zoom hearing or, alternatively, a telephone connection  
6 to the hearing. County Staff served as the host of the remote hearing to assist with and regulate  
7 public participation.

8 The Applicant, Lewis County Public Works, was represented by Cullen Gatten of Lewis  
9 County Prosecuting Attorney's Office, and appeared through Ann Weckback, its Environmental  
10 Planner. Separately, Lewis County Community Development Office, which was responsible for  
11 reviewing the application and providing recommendations, was represented by Eric Eisenberg,  
12 also of the Lewis County Prosecuting Attorney's Office, and appeared through Karen  
13 Witherspoon, Senior Planner.

14 In advance of the public hearing a Staff Report authored by Karen Witherspoon was  
15 prepared on June 26, 2020. The Staff Report, together with a substantial number of attachments,  
16 is collectively identified as Exhibit 1 (hereafter the "Staff Report"). The Staff Report includes  
17 several "Attachments" as well as "Exhibits", all of which are considered part of the "Staff  
18 Report".<sup>1</sup> The Staff Report includes all application materials as well as a substantial amount of  
19 public comment received during staff review (Attachment 2 to the Staff Report). The 22  
20 additional exhibits to the Staff Report are itemized at pages 50-51 of the Staff Report.

21 It is the recommendation of the Staff Report that the requested Shoreline Permits be  
22 approved subject to a number of conditions.

23 \_\_\_\_\_  
24 <sup>1</sup> The Staff Report's reference to attached "exhibits" is likely to cause confusion with the Hearing Examiner's  
25 reference to the "exhibits" presented during the public hearing. To minimize this confusion, a reference to an  
exhibit attached to the Staff Report will be "Exhibit X to the Staff Report", while reference to one of the exhibits  
presented during the hearing will simply be "Exhibit X".

1 A list of other exhibits admitted at, during or following the commencement of the Public  
2 Hearing is attached hereto.

3 The parties and members of the public were reminded of the protocol for the public  
4 hearing, including protocol for conducting a remote hearing via Zoom. With the exception of the  
5 Hearing Examiner the parties were muted until such time as called upon by the Hearing  
6 Examiner to participate. All oral testimony was under oath.

7 The public hearing commenced with the testimony of Karen Witherspoon, author of the  
8 Staff Report. Ms. Witherspoon testified fairly briefly and relied instead upon her extensive Staff  
9 Report and supporting materials. She concluded her testimony by reiterating County Staff's  
10 recommendation that the permits be approved subject to the 49 conditions found at pages 46-50  
11 of the Staff Report.

12 Ms. Witherspoon responded to various questions posed by the Hearing Examiner and  
13 provided the following supplemental testimony:

14 • Like other County day use facilities, the facility is expected to operated from  
15 dawn to dusk which translates to 8:00 a.m. to dusk.

16 • To the extent that the Staff Report is unclear, it is the intention that the facility be  
17 locked when not in use. The County is entering into an agreement with the Packwood  
18 Improvement Club ("PIC") for the maintenance and operation of the facility. County Staff has  
19 no objection to an additional condition of approval that would require the operator to keep the  
20 facility locked when not in use.

21 • Garbage pickup and all other maintenance will be performed by PIC. County  
22 Staff has no objection to an additional of permit approval that the operator not allow garbage to  
23 accumulate.

1 Ms. Witherspoon followed up on these matters by email dated September 29 to the  
2 Hearing Examiner proposing language for two additional conditions of permit approval (Exhibit  
3 13).

4 Following Ms. Witherspoon's testimony, Ann Weckback, Environmental Planner for  
5 Lewis County Public Works, spoke on behalf of the Applicant. Ms. Weckback is responsible for  
6 applications for projects, grants and related matters and is responsible for this application. Much  
7 of her information is contained in the application materials, including the "Burden of Proof"  
8 Statement and supporting documents contained in the Staff Report, as well as in her written  
9 testimony (Exhibit 11). She notes that there is currently no public access to the upper Cowlitz  
10 River in the Packwood area and that the project will allow for fishers, kayakers and other  
11 recreationalists, and the general public access to the upper Cowlitz by providing vehicular  
12 access, parking, restrooms, trails, and an informal location to put kayaks, canoes, and other non-  
13 motorized boats into the river. Ms. Weckback asserts that the application is consistent with the  
14 County Shoreline Master Program and the State's Shoreline Management Act and that it will  
15 satisfy all requirements of Chapter 15.45 LCC for stormwater management and Chapter 15.38  
16 for Critical Areas.

17 Ms. Weckback described the layout of the project: driving into the facility on the  
18 proposed gravel road, public parking and the vault toilets will be to the left of the road while the  
19 trail leading to the river will be to the right. A graveled trail will lead to the river and the boat  
20 access location, relying on a pedestrian suspension bridge to cross an overflow channel to the  
21 river. Interpretive signs will be placed along the trail to inform as well as to warn not to trespass  
22 onto adjoining private lands. The put-in place for kayaks and canoes will not be developed but is  
23 simply a protected area between existing rock barriers. Any trees needing to be removed will be  
24 replaced in accordance with the revegetation plan. The easterly portion of the site, adjacent to  
25

1 private residences, will be hydroseeded with shrubs and trees to establish a vegetative buffer  
2 over the next several years. The existing vegetative buffer to the west will be maintained to  
3 provide effective screening. Once developed, these vegetative buffers will limit view of the  
4 parking lot/toilets except from the Skate Creek Bridge. Ms. Weckback explained that the  
5 proposed vault toilets are the "standard Forest Service" model and will be placed on an elevated  
6 platform to minimize the possibility of being flooded. The facility is designed to experience  
7 minimum impact from flooding. Proposed conditions of approval will require that, following  
8 any flooding, the facility will be closed for the necessary length of time to properly restore it and  
9 eliminate any potential public hazards.

10 Ms. Weckback, in conjunction with Ms. Witherspoon, recognize the MOA with PIC  
11 whereby the volunteer nonprofit organization will be tasked with managing the facility. The  
12 draft MOA is attached to the Staff Report as Exhibit 22. The MOA would allow PIC to provide  
13 all grounds maintenance, garbage removal, custodial services, pay operational costs, manage the  
14 gate's opening and closing (with no overnight use) and provide security, while the County would  
15 agree to pay for the cost of pumping the toilets and custodial supplies.

16 Ms. Weckback concluded by asking for approval of the project subject to the conditions  
17 proposed by County Staff.

18 Following the presentations by Community Development and Public Works the hearing  
19 was open to public testimony. Seven individuals asked to testify:

20 **Chris Murphy.** As noted earlier, Chris Murphy had originally appealed the SEPA  
21 Determination but then later withdrew his appeal. Mr. Murphy has provided written testimony  
22 on several occasions which can be found within Attachment 2 to the Staff Report. In his oral  
23 testimony, Mr. Murphy expands upon his earlier written testimony and asserts that the project's  
24 long term impacts have not been fully analyzed. Citing to WAC 197-11-046(c), he argues that

1 review of the project must carefully consider both short term and long term impacts. He argues  
2 that the County has failed to prove that there will be no net loss of ecological function and that  
3 the project has not mitigated its most significant environmental impacts. In particular, he  
4 believes it unacceptable to allow development of a parking lot so close to the Cowlitz River and  
5 that it will result in hazardous contamination from parked cars. Mr. Murphy asks that the project  
6 be denied outright or, in the alternative, that greater conditions be imposed to ensure that there is  
7 no net loss of ecological function, including heightened requirements for oil/water separators.

8 Alternatively, Mr. Murphy asks that the parking lot be reduced in size as there is simply no need  
9 for 37 parking stalls and the parking lot is an aesthetic blight to neighboring properties. He  
10 concludes by noting that there have been six "100-year" floods during the last twenty years along  
11 this portion of the Cowlitz River and that any similar flooding event would place the toilets at  
12 risk. In summary, Mr. Murphy believes that the project has little public use; will be harmful to  
13 adjoining private landowners and has failed to prove that it will not be environmentally harmful.

14 **Francie Jordan.** Ms. Jordan resides at 109 Alta Drive immediately east of the project. It  
15 is generally acknowledged that Ms. Jordan's property will see the greatest amount of impact from  
16 the project due to its immediate proximity. Ms. Jordan notes that an earlier owner of the project  
17 site was denied permits to build on it due to its environmental issues. She is strongly opposed to  
18 the County's projects as she fears it will cause a loss of habitat for wildlife; will be left to a  
19 volunteer, nonprofit group to manage; and is at constant risk of flooding. She questions how the  
20 site will be beneficial to either of its primary intended uses, fishing and kayaking. She asserts  
21 that it is a poor location for fishing and that the public chooses to instead fish from the opposite  
22 side of the river. She also asserts that the site has no reasonable access for kayaks as the existing  
23 riprap structures will get in the way. Finally, she notes that there have been archaeological finds  
24 on the property but that the County is refusing to disclose those findings.

1           **Lee Grose.** Mr. Grose was having trouble testifying orally and therefore presented his  
2 testimony via email. Mr. Grose speaks as a representative for the Packwood Improvement Club.  
3 He explains how the PIC has agreed to partner with the County to maintain and operate the  
4 proposed facility, including assuring that trash is routinely disposed of and the facility is secured  
5 and locked in the evening. Mr. Grose adds that he has personally witnessed the various major  
6 floods to have struck the area and that he does not believe that any similar floods in the future  
7 will adversely affect the facility, nor will the facility adversely affect the flooding in the  
8 Packwood area. He concludes by noting that there is a significant need in the Packwood area for  
9 public access to the river to avoid the current public safety hazards caused by lack of such  
10 access.

11           **Lonnie Goebel.** Mr. Goebel resides in Packwood and has been a lifelong resident of the  
12 area. He has observed the various recent floods in the region and witnessed that the proposed  
13 site was not impacted by them. At peak fishing times there may be 85-90 people fishing nearby,  
14 resulting in more than 60 cars parked along Skate Creek Road, which in turn, have blocked the  
15 shoulders along Skate Creek Road and placed bicyclists at risk, resulting in at least one serious  
16 accident. Mr. Goebel also believes that the project will significantly improve public safety by  
17 directing the public to this facility and away from Skate Creek Road. Mr. Goebel believes, that  
18 based upon past flooding, any future flooding would not likely affect the proposed toilets but it  
19 would affect private septic systems, and that the threat of flooding to septic systems lies not with  
20 this project but with adjoining private properties.

21           **Bonnie Muesch.** Ms. Muesch has been a resident in the area for the past 20 years and  
22 owns three nearby lots. She is concerned that public use of the facility will lead to trespass onto  
23 adjoining private properties as individuals seek improved access to the river. Ms. Muesch has  
24 spent 25 years with the Thurston County Assessor's Office as an appraiser and asserts that  
25

1 historical data demonstrates that properties abutting public boat launches suffer a loss in value.  
2 She opposes the project as it will result in a loss of privacy and be disruptive.

3 **William Serahn.** Mr. Serahn had earlier provided written testimony and wished to rely  
4 primarily on it. Mr. Serahn believes that the project is badly needed for the reasons set forth in  
5 his written testimony and, in particular, to reduce the current risk to public safety resulting from  
6 the public parking along Skate Creek Road due to a lack of alternatives.

7 At the conclusion of this public testimony, the Community Development and Public  
8 Works Departments were allowed an opportunity for response. Ms. Witherspoon responded that  
9 an important goal of the County's Shoreline Management Plan is public access to the shoreline.  
10 Without this project the Plan's goals are not being fulfilled. She also responds that the proposed  
11 mitigation for the project ensures that there is no net loss of ecological function. Ms. Weckback  
12 responded that the materials prepared in support of the application fully demonstrate why the  
13 project will have no net loss of ecological function or impact flood levels. She also responded to  
14 Ms. Jordan's comments about archaeological finds on the property by explaining that State law  
15 prohibits the disclosure of archaeological discoveries in order to protect them, but that all  
16 archaeological work onsite has been in cooperation with the State and with local tribes.

17 In response to a follow-up question by the Hearing Examiner regarding the potential  
18 flooding of the vault toilet, Ms. Witherspoon explained that the required septic permit for the  
19 toilet will impose a management and maintenance plan that will require consideration of health  
20 emergency issues, including possible flooding.

21 Following the conclusion of all responsive testimony, counsel for Community  
22 Development and for Public Works were allowed to make concluding statements. Following  
23 these statements the hearing was declared to be complete. A few days later, however, County  
24 Staff discovered that the audio portion of the Zoom record was inaudible. This discovery

1 resulted in the Hearing Examiner directing County Staff to notify parties and witnesses who  
2 testified that the audio recording of their testimony had not been properly preserved. Witnesses  
3 were given the opportunity to restate their testimony in written form, or, alternatively, to simply  
4 rely upon the Hearing Examiner's notes. All interested parties were given until 5:00 p.m. on  
5 Friday, October 9, 2020, to provide supplemental testimony. Ms. Grose (Exhibit 13) and Mr.  
6 Serahn (Exhibit 14) responded by re-submitting earlier written testimony. Ms. Jordan responded  
7 by written letter restating her earlier testimony (Exhibit 15). In addition to this supplemental  
8 testimony, Eric Eisenberg provided a brief letter summarizing his concluding statements (Exhibit  
9 16). None of the other parties or witnesses provided any supplemental materials.

10 Accordingly, I make the following:

11 **FINDINGS OF FACT**

12 **General Findings.**

13 1. Any Findings of Fact contained in the foregoing Background or Public Hearing  
14 Sections are incorporated herein by reference and adopted by the Hearing Examiner as Findings  
15 of Fact.

16 2. The Applicant, Lewis County Public Works, requests a Shoreline Substantial  
17 Development Permit to establish a day use recreational area along the Cowlitz River near  
18 Packwood. The proposed construction includes a 24-foot wide gravel access driveway to the  
19 parking area; a gravel parking area with approximately 21 single vehicle stalls for passenger  
20 vehicles and 17 stalls for vehicles with trailers; a double stall ADA-accessible concrete vault  
21 toilet building with 240-square feet of area; a non-motorized kayak/canoe/boat access point and a  
22 loop gravel pathway providing access the boat launch and to the Cowlitz River. Additionally,  
23 interpretive signs will be mounted on displays around the trail and other areas. The development  
24 will include approximately 1,881 cubic yards of fill material and 2,551 cubic yards of  
25

*Findings of Fact, Conclusions of  
Law and Decision Approving  
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1 cut/grading. In addition, should funding become available the driveway and parking area may  
2 become paved. See site maps, Attachment 3 to the Staff Report.

3 3. The Applicant, Lewis County Public Works, also requests a Shoreline Conditional  
4 Use Permit to construct a 35-foot log stringer pedestrian bridge across an overflow channel of  
5 the Cowlitz River as part of the looped trail from the parking area to the river as noted on the site  
6 maps.

7 4. The project site is adjacent to the Ordinary High Water Mark of the Cowlitz  
8 River, a shoreline of statewide significance (Exhibit 16 to the Staff Report). The project is  
9 therefore subject to the Shorelines Management Act (SMA) and the Lewis County Shoreline  
10 Master Program (SMP) and requires a Shorelines Substantial Development Permit for the  
11 improvements noted above.

12 5. The project is located along shoreline that is partially designated as Rural  
13 Conservancy in the SMP and partly as Shoreline Residential in the SMP. In either shoreline  
14 designation, bridges for non-motorized uses are a Conditional Use. Table 5-1 of the SMP. The  
15 proposed 35-foot long stringer pedestrian bridge therefore requires a Shoreline Conditional Use  
16 Permit.

17 6. The project is located at 105 Alta Drive, Packwood, Washington, located in  
18 Sections 15 and 16, Township 13 North, Range 9 East, W.M., bearing Tax Parcel Nos.  
19 035132005005 and 035147001001. The site's two tax parcels contain approximately 5.06 acres

20 7. The site is partially within the Rural Development District 20 Acre (RDD-20)  
21 zoning designation and partially within the Small Town Residential 4 Units Per Acre (STR-4)  
22 zoning designation. See Exhibit 19 to the Staff Report.

23 8. Within the Lewis County Comprehensive Plan Land Use Designation, the project  
24 site is partially within "Other Rural Lands (Nonresource)" and partially within "LAMIRD-Rural  
25 Residential Settlement".

*Findings of Fact, Conclusions of  
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1           9.     As noted earlier, the project site is partially within the Rural Conservancy  
2 designation in the SMP Shoreline Environment and partially within the Shoreline Residential  
3 designation.

4           10.    The project site is within the Lewis County Water Sewer District No. 3-Packwood  
5 Service Area but no water utilities are proposed.

6           11.    As noted in the Staff Report, page 4, County Staff has confirmed that the project  
7 site lies within the Lewis County Airport Obstruction Zone (AOZ) but will not require an AOZ  
8 permit as all improvements will be less than 35 feet in height.

9           12.    Pursuant to the State Environmental Policy Act, the County, as lead agency,  
10 issued a Determination of Non-Significance (DNS) March 17, 2020. The DNS was subsequently  
11 challenged by Chris Murphy but he has since withdrawn his appeal of the SEPA Determination.  
12 No other appeals have been filed.

13           13.    Notification of the public hearing was originally published June 23, 2020, in The  
14 Chronicle and also sent to required agencies, nearby property owners, and those who have  
15 commented on the application (Staff Report, pages 4 and 5). Subsequent notices of revised dates  
16 for the public hearing have similarly been published and mailed in accordance with County  
17 requirements.

18           14.    County Staff recommends approval of the requested permits subject to the 49  
19 conditions of approval set forth at pages 46-50 of the Staff Report.

20           15.    In response to questioning from the Hearing Examiner, Staff would not oppose  
21 two additional conditions of permit approval assuring that the facility is locked when not in use  
22 and that garbage is not allowed to accumulate onsite. Staff has proposed the following two  
23 conditions of project approval to address these issues:  
24  
25

1           ●       Add the following to the end of condition number 26: "Per Lewis County Code  
2 (LCC) Section 12.05.100, the operating hours of day-use parks are 8:00 a.m. to dusk  
3 seven days a week. Gates will be locked during non-operating hours. These hours may be  
seasonally adjusted so long as they remain day-use oriented."

4           ●       Add new condition number 50: "Garbage is not allowed to accumulate on-site and  
5 shall be removed periodically."

6           Findings Relating to the Project Site.

7           16.       Site maps of the project are included in the Applicant's "Burden of Proof"  
8 statement contained in Attachment 3 to the Staff Report. Aerial photos of the site with the  
9 project overlay, as well as photos of the site with the proposed development, are also contained  
10 in the Applicant's Burden of Proof statement.

11           17.       Site maps with overlays of shoreline jurisdiction, tax parcels, floodplains,  
12 floodways and zoning designations are attached to the Staff Report as Exhibits 16-19.

13           18.       The Staff Report, at pages 5-7, contains Findings relating to the site's natural  
14 environment including its topography, soils, surface water, vegetation and wildlife. The Hearing  
15 Examiner has reviewed these Findings and adopts them as his own Findings of Fact.

16           19.       The Staff Report notes that the shoreline along the project site was armored with  
17 riprap, rock barbs and supplemental riprap at various times recently, and 6 bank-roughening  
18 logjams were installed. The project does not propose any alteration to these earlier site  
19 modifications nor does it propose any alteration to the existing riverbank.

20           20.       As noted in the Staff Report, the project will remove 132 trees from the project  
21 area resulting in 1.35 acres with permanent removal of vegetation. Within the shoreline  
22 jurisdiction there will be approximately 1.23 acres of disturbance with .67 acres converted to  
23 non-forestry use.

24           21.       Areas subject to disturbance within designated shoreline jurisdiction will be  
25 replanted/hydroseeded with native vegetation including 106 new native trees. A minimum 20-

1 foot vegetative buffer will be retained along property lines and a minimum of 50-foot buffer will  
2 be planted/hydroseeded between existing private residential parcels and the proposed access road  
3 and parking area (see Site Plan).

4 22. No project work will be conducted below the Ordinary High Water Mark of the  
5 Cowlitz River.

6 23. In addition to the replanting of trees and revegetation as noted above, additional  
7 proposed mitigation includes placing 12 conifers with root wads within the shoreline project area  
8 as well as installing wildlife nesting boxes throughout the area.

9 24. There are no mapped wetlands, wetland buffer, hydric soils, landslide hazard  
10 areas, erosion hazard areas or mapped areas of high arsenic level at the project site.

11 25. There are no wetlands at the project site.

12 26. The project site includes a channel migration zone, areas of moderate to high  
13 liquefactions susceptibility, a mapped critical aquifer recharge area, a 100-year floodplain, and  
14 floodway within portions of the site. These conditions will require additional permits to be  
15 approved by staff or third parties.

16 27. As shown on the aerial map of the site and surrounding properties, the project site  
17 is bordered by the Cowlitz River to the north/west; Skate Creek Road to the west; and residential  
18 development to the south and east. Immediately east of the project is a residential neighborhood  
19 along Alta Drive. At least two of these residential properties have a common border with the  
20 project site while the others are in close proximity. The property most affected by the project is  
21 that belonging to Francie Jordan lying immediately east of the site. Residential development is a  
22 mix of vacation homes and year-round residents. Residential development continues to the south  
23 and east of the project as well as north of the project across the Cowlitz River.

1           28.     There is no public access to the Cowlitz River in the vicinity and none  
2 downstream until Lake Skanewa near Randle.

3           29.     The upper Cowlitz River is popular with fishers, kayakers and other boaters, and  
4 the public.

5           30.     To gain access to the upper Cowlitz River, recreational users are currently relying  
6 upon permission from private landowners or are making unauthorized use of public lands. A  
7 popular access point is just north of the Skate Creek Road Bridge across the Cowlitz River.  
8 Access to this and nearby popular locations leads to large numbers of vehicles being parked  
9 along Skate Creek Road during fishing seasons and other popular recreational times.

10           Finding Relating to General Regulations.

11           Archaeological Resources.

12           31.     Archaeological and historic resources are addressed in the SMP at 4.02.

13           32.     The Staff Report, at pages 13 and 14, contains Findings relating to the Staff's  
14 review of the project to determine compliance with SMP 4.02. As noted in the Staff Report, a  
15 Cultural Resources Survey was conducted and its findings were submitted by the Recreation and  
16 Conservation Office to DAHP and potentially affected tribes, with no comments, concerns or  
17 recommended conditions by either DAHP or affected tribes.

18           33.     The Hearing Examiner has reviewed these Findings and adopts them as his own  
19 Findings of Fact.

20           34.     A neighbor observed that during the Cultural Resources Survey, archaeological  
21 items appear to have been discovered yet none of the agencies involved will reveal the nature of  
22 the assets discovered. The Applicant and Staff respond that the reason why these assets are not  
23 revealed is that State law requires their nondisclosure in order to protect the assets.

1 35. To fully comply with SMP 4.02 Staff recommends various conditions of approval  
2 as noted at page 13 in the Staff Report.

3 Environmental Impacts and Mitigation.

4 36. The SMP addresses environmental impacts and mitigation at SMP 4.03.

5 37. The Staff Report, at pages 14-15, analyzes the project's compliance with SMP  
6 4.03. The Staff Report addresses efforts to minimize vegetation removal, especially within the  
7 shoreline buffer; replanting and reseeding to ensure no net loss of ecological functions;  
8 utilization of regional road maintenance, Best Management Practices (BMP's); compliance with  
9 the Lewis County Stormwater regulations through a Stormwater Permit and Construction  
10 Stormwater General Permit; mitigation through riparian enhancements (trees and root wads) and  
11 wildlife nesting boxes; spill response plans and various other environmental protections and  
12 mitigations as noted in the Staff Report.

13 38. Staff has determined that the project does not generate sufficient traffic for a  
14 Traffic Impact study as it is not anticipated to generate 50 or more peak PM hour trips.

15 39. To assure compliance with SMP 4.03 Staff recommends a list of conditions for  
16 project approval set forth at page 16 of the Staff Report. Staff finds that the project, as  
17 conditioned, satisfied SMP 4.03.

18 40. The Hearing Examiner has reviewed the Staff's proposed Findings relating to  
19 compliance with SMP 4.03 and adopts them as his own Findings of Fact.

20 Critical Areas and Shoreline Vegetation Conservation.

21 41. The SMP addresses critical areas and shoreline vegetation conservation at SMP  
22 4.04.

23 42. The Staff Report, at pages 17-19, contains Findings relating to the project's  
24 compliance with SMP 4.04.

1           43.     Table 4-1 of the SMP establishes standard shoreline buffers from the Ordinary  
2 High Water Mark. As noted in the Staff Report, the non-motorized boat put in location; the  
3 pedestrian bridge and 355 linear feet of the gravel pathway are water dependent uses having a  
4 zero-foot shoreline buffer. The remaining looped gravel pathway is within a 75-foot shoreline  
5 buffer for recreational development. Forest practice areas and parking have a 150-foot shoreline  
6 buffer. The proposed parking area is located outside of this buffer. Staff finds that the project, as  
7 designed and as conditioned, satisfies all shoreline buffer requirements.

8           44.     The Staff Report, at pages 18-19, contains Findings relating to vegetation  
9 conservation standards. Staff finds that the project has been designed to avoid removing existing  
10 native vegetation to the maximum extent feasible within shoreline and critical area buffers. Staff  
11 proposes various conditions of project approval, found at pages 18 and 19 to ensure compliance  
12 with vegetation conservation standards.

13           45.     Staff finds that the project satisfies the requirements of SMP 4.04 subject to the  
14 conditions found at pages 18 and 19 of the Staff Report.

15           46.     The Hearing Examiner has reviewed the Staff's proposed Findings relating to  
16 compliance with SMP 4.04 and adopts them as his own Findings of Fact.

17           Flood Hazard Management.

18           47.     The SMP addresses flood hazard management at SMP 4.05.

19           48.     The Staff Report, at pages 20-22, contains Findings relating to the project's  
20 compliance with SMP 4.05.

21           49.     Staff notes that the entire project lies within the mapped 100-year floodplain and  
22 that a portion of the parking area, the looped gravel trail, the pedestrian bridge, and the boat  
23 launch area are all located within the floodway. The Applicant has submitted a Flood  
24 Development Permit Application for all development within the 100-year floodplain and a  
25

1 Hydraulic Impact Assessment for development within both the 100-year floodplain and the  
2 floodway. These assessments are referred to as the "H&H Study" in the Staff Report and is  
3 included in Attachment 3 to the Staff Report.

4 50. The H&H Study concludes that development in the floodplain and floodway will  
5 not increase flood hazards and will not impact the pre-project base flood elevations, floodway  
6 elevations or floodway data widths.

7 51. The Staff Report notes that a majority of the project site is within the mapped  
8 moderate and severe Channel Migration Zone (CMZ) and the entire project is within the mapped  
9 moderate to high Soil Liquefaction Susceptibility Area, although both the entrance driveway and  
10 vault toilet facility are outside of the mapped moderate and severe CMZ.

11 52. A Geomorphic Hazard Study was performed to determine the potential impacts  
12 from soil liquefaction (Exhibit 20 to Staff Report). The report concludes that there are no  
13 additional structural flood hazard reduction measures required for the project, and that the project  
14 is adequately protected from channel migration as a result of previously constructed revetments  
15 intended to protect the Skate Creek Bridge.

16 53. The County's Public Works Senior Engineer, Rod Lakey, finds that onsite  
17 infiltration tests confirm that the project soil is highly permeable but that the project components  
18 have low ground pressure and, as a result, potential damage from soil liquefaction would be  
19 extremely low.

20 54. To ensure compliance with SMP 4.05, Staff has recommended conditions of  
21 approval set forth on page 22 of the Staff Report.

22 55. Staff finds that the project, as conditioned satisfied SMP 4.05.

23 56. Members of the public have voiced concerns with potential damage to the site  
24 from soil liquefaction as well as from possible channel migration but have not presented any  
25 expert testimony contradicting the Staff's Findings.

*Findings of Fact, Conclusions of  
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1           57.     The Hearing Examiner has reviewed the Staff's Findings relating to compliance  
2 with SMP 4.05 and adopts them as his Findings of Fact.

3           Public Access.

4           57.     The SMP addresses public access at SMP 4.06.

5           58.     Among other requirements, projects intended to provide shoreline public access  
6 shall be designed to achieve no net loss of ecological functions and where impacts are identified,  
7 mitigation shall be required. SMP 4.06(E). Public access facilities shall be compatible with  
8 adjacent private properties using vegetative buffering or other techniques to define the separation  
9 between public and private space. SMP 4.06(G).

10          59.     The project is intended to provide shoreline public access and is therefore subject  
11 to SMP 4.06.

12          60.     The Staff Report, at pages 23 and 24, contains Findings relating to the project's  
13 compliance with SMP 4.06. Staff finds that the project's purpose is to establish public access to  
14 the Cowlitz River in an area where there is currently no assured public access. Staff also finds  
15 that the project, as conditioned, will clearly identify the boundaries to the project site and warn  
16 public users against trespass onto adjoining private properties. County Staff adds that the  
17 facilities will be compatible with adjacent private properties or will be made compatible by using  
18 vegetative buffering as described earlier in other Findings.

19          61.     Staff also notes that the project includes the re-establishment of a vegetative  
20 buffering along the project's east boundary and the preservation of an existing vegetative buffer  
21 on its west boundary to separate the public and private properties. Although this does not ensure  
22 an immediate vegetative buffering between the project and private properties to the east, the  
23 conditions of permit approval require not only the revegetation of this buffer but its continued  
24 maintenance to make certain that the buffer develops as envisioned.

1           62.    To further ensure compatibility between the project and adjoining private  
2 properties, permit approval has been conditioned upon the installation of an access gate and use  
3 limited to daylight hours. In addition, Staff would not object to a refinement of the conditions of  
4 approval to make certain that the gate is locked at all other times.

5           63.    Neighboring landowners remain concerned that the project will become unsightly  
6 due to the accumulation of trash. In response, the County is in agreement to add an additional  
7 condition of permit approval that the park operator not allow trash to accumulate onsite.

8           64.    Neighbors are also concerned that users of the public facility will venture off of  
9 the property and trespass onto adjoining private properties. County Staff responds that it will  
10 install signs along the park boundary to warn users from trespassing. These warning signs,  
11 together with the vegetative buffers, will improve compatibility.

12  
13           65.    The County's approval of the requested permits have been conditioned upon  
14 installing and maintaining signs indicating the public's right to access and hours of operation, and  
15 have these signs placed in conspicuous locations.

16           66.    County Staff finds that the project will comply with SMP 4.06 subject to the  
17 conditions set forth on page 24 of the Staff Report but is willing to amend the proposed  
18 conditions of project approval as follows:

19           ●    Add the following to the end of condition number 26: "Per Lewis County Code  
20 (LCC) Section 12.05.100, the operating hours of day-use parks are 8:00 a.m. to dusk  
21 seven days a week. Gates will be locked during non-operating hours. These hours may be  
seasonally adjusted so long as they remain day-use oriented."

22           ●    Add new condition number 50: "Garbage is not allowed to accumulate on-site and  
shall be removed periodically."

23 (See Exhibit 13 to the Staff Report).  
24  
25

1           67.     The Hearing Examiner has reviewed Staff's Findings relating to SMP 4.06 and,  
2 with the adoption of the additional conditions agreed to by Staff, adopts them as his own  
3 Findings of Fact.

4           Water Quality.

5           68.     The SMP addresses water quality at SMP 4.07.

6           69.     Public opposition to the project has identified two water quality issues: (a) the  
7 possible release of effluent from the vault toilets in the event of a major flood, and (b)  
8 contamination from parked vehicles migrating to stormwaters or the Cowlitz River.

9           70.     The Staff Report, at pages 24-28, contains Findings relating to the project's  
10 compliance with SMP 4.07 and responds to the concerns raised by project opponents.

11           71.     The project proposes the installation of a vault toilet that does not include a septic  
12 system. As shown on site maps, it will be placed outside of the 150-foot shoreline buffer but will  
13 be located within the 100-year floodplain as well as the mapped critical aquifer recharge areas.  
14 A Flood Development Permit will therefore be required.

15           72.     As noted in the Staff Report, the vault toilet must be in compliance with all  
16 requirements for critical aquifer recharge areas. Underground tanks, including vault toilets, are  
17 identified as high intensity uses and are allowed in critical aquifer recharge areas subject to  
18 compliance with LCC Chapter 17.35A. Similarly, the project's day-use facilities must also  
19 comply with standards for parks as set forth in LCC 17.35A.880(4)(g).

20           73.     County Staff finds that the project, as conditioned, meets all requirements for  
21 construction of the vault toilet and other improvements within the floodplain and critical aquifer  
22 recharge areas.

23           74.     County Staff (Witherspoon/Weckback) have explained that the vault toilet will be  
24 elevated making flooding of the toilet highly unlikely. In addition, and as noted earlier in the  
25

1 Public Hearing Section, the permitting for the toilet will require a maintenance plan that, among  
2 other things, requires the County to plan for flooding as part of emergency planning.

3 75. County Staff acknowledge public concerns regarding contamination from vehicle  
4 runoff in the parking lot. Staff proposes a condition of permit approval that there must be written  
5 verification that the design of the stormwater facilities under the stormwater permit comply with  
6 LCC 17.35A.880(1)(b) and (1)(c) including oil-water separators for impervious surfaces.

7 76. Staff finds that the project, subject to the conditions found at page 27 and 28 of  
8 the Staff Report, satisfies the requirements of SMP 4.05.

9 77. The Hearing Examiner has reviewed the Staff's Findings and adopts them as his  
10 own Findings of Fact.

11 Findings Relating to Specific Shoreline Regulations, SMP Chapter 5.

12 SMP 5.02 General Shoreline Use.

13 78. The Staff Report, at pages 29-37, contains Findings relating to the project's  
14 compliance with the specific shoreline use regulations contained in SMP 5.02, et seq.

15 79. Staff finds that the project complies with the most restrictive bulk and  
16 dimensional requirements in LCC Title 17 or SMP Section 5.04, and thus satisfies SMP 5.02(B).

17 80. Staff finds that all accessory uses, including parking, stormwater management  
18 facilities and the toilet are located out of the 150-foot shoreline buffer, thus satisfying SMP  
19 5.02(C).

20 81. The Hearing Examiner has reviewed these Findings and adopts them as his own  
21 Findings of Fact.

22 SMP 5.03 Allowed Shoreline Use.

23 82. Proposed improvements including the informal boat launch, forest practice  
24 activities; parking, water-orientated recreational development, trails, and signs are all permitted  
25

1 uses in the Shoreline Residential environment as well as the Rural Conservancy environment  
2 subject to a Substantial Development Permit.

3 83. The proposed pedestrian bridge is permitted in the Shoreline Residential  
4 environment as well as the Rural Conservancy environment subject to a Shoreline Conditional  
5 Use Permit.

6 84. The Hearing Examiner has reviewed these Findings and adopts them as his own  
7 Findings of Fact.

8 SMP 5.04 Development Standards.

9 85. No proposed structures will exceed the 35-foot height limit set forth in SMP 5.04.

10 SMP 5.05 Boating and Water Access Facilities.

11 86. Staff finds that the proposed non-motorized boat access and other water access are  
12 in compliance with SMP 5.07. The proposed boat access area does not involve any  
13 improvements and no work will be conducted below the Ordinary High Water Mark of the river,  
14 nor will any alteration of the riverbank be necessary. Signage will direct kayakers to an area  
15 with an existing general grade into the river between existing rock barbs. Conditions of permit  
16 approval require the access site to be monitored for continued safe water access and modification  
17 to its location and/or the signage it later determined to be appropriate. Its status will be  
18 reassessed after each five-year flood event or greater to confirm its continued safety. There will  
19 be no lighting for the access point or any other areas of the facility as it is intended for day-use  
20 only. Staff finds that subject to these conditions the project is in compliance with SMP 5.07.

21 87. The Hearing Examiner has reviewed these Findings and adopts them as his own  
22 Findings of Fact.

23 SMP 5.09 Forest Practice.

24 88. Staff finds that the project is in compliance with SMP 5.09 relating to forest  
25 practices.

*Findings of Fact, Conclusions of  
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1 89. The Hearing Examiner has reviewed these Findings and adopts them as his own  
2 Findings of Fact.

3 SMP 5.12 Parking.

4 90. The proposed parking facilities are regulated by SMP 5.12.

5 91. SMP 5.12(C) requires that exterior parking facilities shall be designed and  
6 landscaped to minimize adverse impacts to adjacent and abutting properties in shoreline  
7 jurisdiction.

8 92. Those opposing the project argue that the proposed parking facilities are larger in  
9 size, and contain more parking stalls, than the project requires and argue that the parking lot's  
10 excessive size fails to minimize adverse impacts to adjacent and abutting properties by causing  
11 visual blight.

12 93. Supporters of the project have responded that the purpose of the project is to  
13 alleviate the current problem with public parking along Skate Creek Road where, during peak  
14 fishing periods, many dozens of vehicles are parked along Skate Creek Road resulting in public  
15 safety concerns.

16 94. The size of the parking lot is reasonably related to the intended purposes of the  
17 facility and the expected number of users. Its design, and the vegetative buffers surrounding it,  
18 are designed to minimize adverse impacts to adjacent and abutting properties.

19 95. Staff finds that the project, as conditioned, is in compliance with SMP 5.12.

20 96. The Hearing Examiner has reviewed these Findings and adopts them as his own  
21 Findings of Fact.

22 SMP 5.13 Recreational Development.

23 97. The SMP addresses recreational development at SMP 5.13. Among other  
24 requirements, recreational facilities shall make adequate provisions, such as screening, buffer  
25

1 strips, fences and signs, to minimize impacts to neighbors and prevent the overflow of  
2 pedestrians onto adjacent private properties.

3 98. Trails shall be planted or landscaped to provide a visual buffer for adjoining  
4 similar uses or scenic areas. .

5 99. Recreational proposals shall include facilities for water supply, wastewater and  
6 garbage disposal in conformance with County standards.

7 100. Recreational development shall be located, designed and constructed in a manner  
8 that assures no net loss of shoreline ecological functions.

9 101. The County has entered into a Memorandum of Agreement (MOA) with PIC  
10 (Exhibit 22 to Staff Report). The MOA is intended to allow PIC to operate and maintain the  
11 facility. It states that "The Club will provide all grounds maintenance services, including  
12 garbage removal and custodial services, pay all operational costs relating to grounds  
13 maintenance, provide gate opening and closing (no overnight camping), and provide security for  
14 the park. In return, the County agrees to pay for pumping of the vault toilets, provide custodial  
15 supplies for the toilets, and ensure an adequate inventory of custodial supplies to facilitate  
16 maintenance of the facility.

17 102. The MOA provides that in the event PIC fails to maintain the park adequately, the  
18 County reserves the right to resume operation or to advertise and retain other organizations to  
19 operate it. Public Works confirms that should PIC not fulfill its responsibilities in the MOA,  
20 Lewis County Facilities Department will be responsible for ensuring that all obligations are met  
21 (Exhibit 12 to Staff Report).

22 103. To assure compliance with the requirements for SMP 5.13, County Staff has  
23 requested a condition of approval that the MOA be signed by the parties and submitted to  
24 Community Development prior to operations; that the facilities shall meet the requirement of  
25

1 Lewis County Code Chapter 12.05 for County park use; and that Lewis County Facilities  
2 Department will be ultimately responsible for the oversight of the maintenance and use of the  
3 facility, whether through third party (PIC) or directly if the third party contractor fails to comply.

4 104. Staff finds that, as conditioned, the project will satisfy the requirements of SMP  
5 5.13.D for screening and buffers, signs, and will minimize impacts to neighbors and prevent the  
6 overflow of pedestrians onto adjacent private properties; that the requirements of SMP 5.13.F  
7 have been satisfied in that trails will have visual buffers from adjoining dissimilar uses; that the  
8 requirements of SMP 5.13.G for water, wastewater and garbage disposal are adequately  
9 addressed; and that the project, as conditioned, assures no net loss of shoreline ecological  
10 functions pursuant to SMP 5.13.H.

11 105. The Staff Report, at pages 35 and 36, finds that the project, as conditioned, will  
12 satisfy the requirements of SMP 5.13.

13 106 As noted in prior Findings, Staff is in agreement to amend the proposed  
14 conditions to better ensure compliance with SMP 5.13.

15 107. The Hearing Examiner has reviewed the Staff's proposed Findings, as well as the  
16 proposed amended conditions, and adopts them as his own Findings of Fact.

17 SMP 5.15 Signs.

18 108. The Staff Report, at page 37, contains Findings relating to SMP 5.15 and the  
19 requirements for any signs. Staff finds that all proposed signage on the property is in compliance  
20 with SMP 5.15. The Hearing Examiner has reviewed these Findings and adopts them as his own  
21 Findings of Fact.

22 Findings Relating to SMP Chapter 6, Shoreline Modification Regulations.

23 SMP 6.01, Shoreline Modification.

24 109. As noted in prior Findings, the project includes clearing, grading and filling  
25 activities landward of the Ordinary High Water Mark.

1 110. Pursuant to Table 6-1 of the SMP, clearing and grading activities and the  
2 placement of will landward of the Ordinary High Water Mark are permitted uses in both the  
3 Rural Conservancy environment and the Shoreline Residential environment.

4 SMP 6.02, Shoreline Modification Provisions.

5 111. All shoreline modifications must be in compliance with SMP 6.02.

6 112. The project's shoreline modifications include: the access road, parking area,  
7 stormwater system, vault toilets, looped gravel pathway, and pedestrian bridge.

8 113. The Staff Report, at page 38, finds that these shoreline modifications are designed  
9 in compliance with SMP 6.02.

10 114. The Hearing Examiner has reviewed these Findings and adopts them as his own  
11 Findings of Fact.

12 SMP 6.03, Clearing, Grading and Fill.

13 115. Any clearing, grading and filling activities as part of the project must be in  
14 compliance with SMP 6.03.

15 116. The project proposes to clear 1.23 acres of vegetation including 117 trees in the  
16 designated shoreline. Proposed mitigation includes replanting/hydroseeding .5 acres of native  
17 vegetation within the designated shoreline, including 106 trees. The removal of native  
18 vegetation within the shoreline buffer will be compensated at a minimum of 1/1 ration and 12  
19 conifers with root wads will be placed within the designated shoreline.

20 117. The project also requires excavation of 2,551 cubic yards of material and the  
21 placement of 1,881 cubic yards of fill. All excavated material not utilized onsite will be taken  
22 offsite to a government approved pit or fill site.

23 118. The Staff Report, at page 40 and 41, contains Finding relating to the project's  
24 compliance with SMP 6.03. Staff finds that clearing, grading and filling activities are the  
25

1 minimum needed for the construction of the day-use area and that no speculative clearing,  
2 grading or fill is proposed. The clearing and grading will not significantly alter the topography  
3 of the landscape in a manner that affects hydrology or increases the risk of slope failure.  
4 Proposed clearing and grading within the 75-foot shoreline buffer is necessary for the graveled  
5 loop pathway that provides public access to the boat launch, fishing access and general  
6 enjoyment of the shoreline.

7 119. Staff additionally finds that the required construction stormwater general permit;  
8 the stormwater pollution prevention plan to be approved by Ecology; stormwater plan review by  
9 Lewis County; the use of temporary and permanent erosion control measures and Best  
10 Management Practices; ongoing and long term site inspection and maintenance of erosion  
11 control mechanisms; and other requirements for compliance with the Flood Development Permit,  
12 together with no placement of fill on State-owned aquatic lands or any placement of fill below  
13 the Ordinary High Water Mark, will all contribute toward compliance with SMP 6.03 and ensure  
14 that there is no net loss of ecological function.

15 120. Staff concludes that the project, as conditioned, is in compliance with all  
16 requirements of SMP 6.03.

17 121. The Hearing Examiner has reviewed these Findings and adopts them as his own  
18 Findings of Fact.

19 Findings Relating to SMP Chapter 7.

20 122. All shoreline permits must comply with the provisions of SMP 7.02.02 which, in  
21 turn, requires compliance with all development standards of the Lewis County Code, Chapter  
22 90.58 RCW, the SMA and the SMP. The Applicant must also meet all review criteria for  
23 development found in WAC 173-27-140.  
24  
25

1           123. Staff finds that the project, as conditioned, satisfies all requirements of SMP  
2 7.02.02. The Hearing Examiner has reviewed the Staff's Findings and adopts them as his own  
3 Findings of Fact.

4           124. Applications for Shorelines Substantial Development Permits must satisfy the  
5 requirements of SMP 7.04.01.

6           125. Staff finds that the application, as conditioned, has satisfied all requirements for a  
7 Shorelines Substantial Development Permit. The Hearing Examiner has reviewed the Staff's  
8 Findings and adopts his own Finding of Fact.

9           126. Applications for Shoreline Conditional Use Permits must satisfy the requirements  
10 of SMP 7.04.02 including compliance with the criteria found in WAC 173-27-140 and WAC  
11 173-27-160.

12           127. As noted in earlier Findings, the proposed pedestrian bridge requires a Shoreline  
13 Conditional Use Permit.

14           128. Staff finds that the project, as conditioned, satisfies all requirements for a  
15 Conditional Use Permit for the pedestrian bridge. The Hearing Examiner has reviewed these  
16 Findings and adopts them as his own Findings of Fact.

17           Additional Findings Relating to No Net Loss of Ecological Functions.

18           129. Several provisions of the SMP require that the project, as conditioned, assures no  
19 net loss of ecological functions in the shoreline jurisdiction, including SMP 4.03, 4.04, 4.05,  
20 4.06, 5.07, 5.09, 5.13, 6.02, and 6.03.

21           130. Opponents of the project assert that the Applicant has not provided adequate  
22 assurance that there will be no net loss of ecological functions to the shoreline.

23           131. County Staff finds that the project, as conditioned, fully assures that there will be  
24 no net loss of ecological function for all of the reasons set forth in earlier Findings.

1 132. Opponents of the project have not presented any evidence contradicting the  
2 County's evidence in support of there being no net loss. Although opponents express concern  
3 about such a possibility, no evidence has been presented that the project, as conditioned, will not  
4 assure no net loss of ecological function.

5 133. The Hearing Examiner concurs with County Staff finds that the project, as  
6 conditioned, will have no net loss of ecological function for all of the reasons set forth in earlier  
7 Findings.

8 Findings Relating to Compatibility with Adjoining Uses.

9 134. Many of the provisions of the SMP applicable to this project, especially SMP  
10 4.06, 5.07, 5.12 and 5.13, recognize the need to make adequate provisions to minimize impacts  
11 to neighbors and prevent the overflow of users onto adjoining private properties. The SMP  
12 recognizes that screening, buffers, signs, limitations on hours of use, proper provisions for  
13 control of garbage, proper use of utilities, and the regular maintenance of the facility, are all  
14 means by which compatibility with adjoining private uses can be achieved.

15 135. Staff finds that the project, as conditioned, achieves a sufficient level of  
16 compatibility with adjoining private properties by implementing all of the above mitigations.

17 136. The Hearing Examiner concurs with Staff and finds that the project, as  
18 conditioned, makes adequate provision to minimize impacts to neighboring properties.

19 Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

20 **CONCLUSIONS OF LAW**

21 General Conclusions.

- 22 1. The Hearing Examiner has jurisdiction over the parties and the subject matter.  
23 2. Any Conclusions of Law contained in the foregoing Background, Public Hearing,  
24 or Findings of Fact Sections are hereby incorporated herein by reference and adopted by the

25 Hearing Examiner as his Conclusions of Law.

*Findings of Fact, Conclusions of  
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1           3.     All public notice requirements for this application have been met.

2           4.     All SEPA requirements have been met.

3           5.     To more fully accomplish the goals and policies of the SMA and the SMP, the  
4 proposed conditions of project approval should be amended to include those additional  
5 conditions set forth in Finding of Fact No. 15. All Conclusions of Law hereafter are premised  
6 upon these revised conditions.

7           Conclusions Relating to the General Requirements of the SMA.

8           6.     The project is adjacent to the Ordinary High Water Mark of the Cowlitz River.  
9 The Cowlitz River is a shoreline of statewide significance. This project is therefore subject to  
10 the requirements of the Shoreline Management Act (SMA, Chapter 90.58 RCW).

11           7.     The Washington Legislature enacted the SMA because Washington's shorelines  
12 are fragile and the mounting pressure of development in the shorelines necessitates coordination  
13 in their management. The SMA is broadly construed to protect the State's shorelines as fully as  
14 possible. All development on the shorelines of the State must conform to the SMA (*Beuchel v.*  
15 *Department of Ecology*, 125 Wn.2d 196, 203 (1994)).

16           8.     The Applicant has the burden of proving that all requirements of the SMA and the  
17 Lewis County SMP have been met for the issuance of a Shoreline Substantial Development  
18 Permit and/or a Shoreline Conditional Use Permit.

19           9.     For shorelines of statewide significance, Ecology and local governments shall  
20 give preference in the following order to uses which: (1) recognize and protect the statewide  
21 interest over local interests; (2) preserve the natural character of a shoreline; (3) result in long-  
22 term over short-term benefit; (4) protect the resources and ecology of the shoreline; (5) increase  
23  
24  
25

1 public access to publicly owned areas of the shoreline; (6) increase recreational opportunities for  
2 the public in the shoreline; (7) provide for any other element as defined in RCW 90.58.100  
3 deemed appropriate or necessary. (RCW 90.58.020)

4 10. The project, as conditioned, recognizes and protects the statewide interest over  
5 local interest.

6 11. The project, as conditioned, preserves the natural character of the shoreline.

7 12. The project, as conditioned, results in long-term over short-term benefit.

8 13. The project, as conditioned, protects the resources and ecology of the shoreline.

9 14. The project, as conditioned, increases public access to publicly owned areas of the  
10 shorelines.  
11

12 15. The project, as conditioned, increases recreational opportunities for the public in  
13 the shoreline.

14 16. The project, as conditioned, is consistent with the policies of the SMA.

15 17. Three categories of shoreline use enjoy priority under the SMA: (1) single-family  
16 residences; (2) water dependent uses, including ports, industrial and commercial development;  
17 and (3) shoreline recreation uses or other uses which provide public access to the shorelines.  
18 (RCW 90.58.020)

19 18. No one category of priority shoreline use enjoys a higher priority over the other  
20 two.  
21

22 Conclusions Relating to the Lewis County SMP.

23 Conclusions Relating to Chapter 3 SMP.

24 19. The project, as conditioned is consistent with the Rural Conservancy Management  
25 Policies.

*Findings of Fact, Conclusions of  
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1           20.    The project, as conditioned, is consistent with the Shoreline Residential  
2 Management Policies.

3           Conclusions Relating to Chapter 4 SMP.

4           21.    The project, as conditioned, is in compliance with SMP 4.02 relating to  
5 archaeological and historic resources.

6           22.    The project, as conditioned, complies with the requirements of SMP 4.03 relating  
7 to environmental impacts and mitigation.

8           23.    The project, as conditioned, is in compliance with the requirements of SMP 4.04  
9 relating to critical areas and shoreline vegetation conservation.

10          24.    The project, as conditioned, is in compliance with the requirements of SMP 4.05  
11 relating to flood hazard management.

12          25.    The project, as conditioned, is in compliance with the requirements of SMP 4.06  
13 relating to public access.

14          26.    The project, as conditioned, is in compliance with the requirements of SMP 4.07  
15 relating to water quality including the requirements set forth in Chapters 17.35 and 17.35A LCC.

16          27.    The project, as conditioned, is in compliance with all other requirements of  
17 Chapter 4 of the SMP.

18           Conclusions Relating to Chapter 5 SMP.

19          28.    The project, as conditioned, is in compliance with SMP 5.02 relating to general  
20 shoreline use.

21          29.    The proposed improvements are permitted uses in both the Shoreline Residential  
22 environment as well as the Rural Conservancy environment, while the pedestrian bridge is a  
23 permitted use subject to a Shoreline Conditional Use Permit. SMP 5.03  
24  
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1           30.    The project, as conditioned, is in compliance with SMP 5.04 relating to  
2 development standards.

3           31.    The project, as conditioned, is in compliance with SMP 5.07 relating to boating  
4 and water access facilities.

5           32.    The project, as conditioned, is in compliance with SMP 5.09 relating to forest  
6 practices.

7           33.    The project, as conditioned, is in compliance with SMP 5.12 relating to parking.

8           34.    The project, as conditioned, is in compliance with SMP 5.13 relating to  
9 recreational development.

10          35.    The project, as conditioned, is in compliance with SMP 5.15 relating to signs.

11          36.    The project, as conditioned, is in compliance with all other requirements of  
12 Chapter 5 SMP.

13           Conclusions Relating to Chapter 6 SMP.

14          37.    The project, as conditioned, satisfies the requirements of SMP 6.01 relating to  
15 shoreline modifications.

16          38.    The project, as conditioned, satisfies the requirements of SMP 6.04 relating to  
17 clearing, grading and fill.

18          39.    The project, as conditioned, satisfies all other requirements of Chapter 6 SMP.

19           Conclusions Relating to Chapter 7 SMP.

20          40.    The project, as conditioned, satisfies all requirements of Chapter 7 SMP.

21           Conclusions Relating to Shoreline Conditional Use Permits (SCUP).

22          41.    The pedestrian bridge is a conditional use in either the Rural Conservancy or  
23 Shoreline Residential shorelines.  
24  
25

*Findings of Fact, Conclusions of  
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1 42. Project uses requiring an SCUP must be evaluated for compliance with the five  
2 criteria listed in WAC 173-27-160.

3 43. The project, as conditioned, is consistent with the goals and policies of the SMA  
4 and the SMP.

5 44. The project, as conditioned, does not interfere with the normal public use of  
6 public shorelines.

7 45. The project, as conditioned, is compatible with other authorizes uses within the  
8 area and with uses planned for the area under the Lewis County Comprehensive Plan and SMP.

9 46. The project, as conditioned, will cause no significant adverse effects to the  
10 shoreline environment in which it is to be located.

11 47. The public interests will not suffer any substantial detrimental affect.

12 48. Consideration has been given to the cumulative impact of additional requests for  
13 like actions in the area.

14 49. The project, as conditioned, satisfies the conditional use criteria for an SCUP.

15 50. The project satisfies all other requirements of Chapter 173-27 WAC.

16 51. The requested Shoreline Substantial Development Permit and Shoreline  
17 Conditional Use Permit should be granted subject to the revised conditions of approval.

18 Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing  
19 Examiner makes the following:

20  
21 **DECISION**

22 Based upon the above Findings of Fact and Conclusions of Law, the requested  
23 Substantial Development Permit and Shoreline Conditional Use Permit to establish a public day  
24

1 use area along the Cowlitz River near Packwood for recreational activity are hereby **approved**  
2 subject to the following conditions:

3 1. The applicant/ property owner shall comply with the conditions of development  
4 identified in the Land Development Review file number LDR19-0049 as corrected on June 5,  
5 2020 (Staff Exhibit 11). If there is a conflict between and the LDR conditions of approval and  
6 another permit's conditions of approval, the more restrictive conditions of approval shall apply.

7 2. Twelve conifers, to be felled with root wads, are to be placed within the shoreline  
8 area of this project and wildlife nesting boxes shall be installed throughout the project area.

9 3. The applicant shall follow the Planting Plan submitted in the burden of proof  
10 statement Appendix A – Site Development Plan.

11 4. In the event any archaeological or historic materials are encountered during  
12 project activity, work in the immediate area (initially allowing for a 30 foot to 100 foot buffer;  
13 this number may vary by circumstance) must stop and the following actions taken: 1) Implement  
14 reasonable measures to protect the discovery site, including any appropriate stabilization or  
15 covering; 2) Take reasonable steps to ensure the confidentiality of the discovery site; and 3) Take  
16 reasonable steps to restrict access to the site of discovery.

17 5. The project proponents will notify the concerned Tribes and all appropriate  
18 county, state, and federal agencies, including the Department of Archaeology and Historic  
19 Preservation (DAHP). The agencies and Tribe(s) will discuss possible measures to remove or  
20 avoid cultural materials, and will reach an agreement with the project proponent regarding  
21 actions to be taken and disposition of material.  
22  
23  
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1           6.     If human remains are uncovered, appropriate law enforcement agencies shall be  
2 notified first, and the above steps will be followed. If the remains are determined to be Native,  
3 consultation with the affected Tribes will take place in order to mitigate the final disposition of  
4 said remains.

5           7.     All project work completed for this project will be above the Ordinary High  
6 Water Mark (OHWM) of the Cowlitz River.

7           8.     Regional Road Maintenance Best Management Practices (BMPs) will be  
8 implemented; these include staking of project limits, installation of silt fencing, installation of  
9 straw wattles, and the marking or clearing limits in the field to minimize vegetation disturbance.

10          9.     Any/all disturbed soil that is not being worked, whether at final grade or not, shall  
11 be hydro seeded within 2 to 7 days as appropriate (within 2 days from October 1st through April  
12 30th and within 7 days from May 1st through September 30th).

13          10.    The gravel parking area, gravel access road and gravel looped pathway exceeds  
14 5,000 square foot of disturbed area and will require a Lewis County Stormwater Permit in  
15 addition to the Construction Stormwater General Permit (with Stormwater Pollution Prevention  
16 Plan – SWPPP) required by the Washington State Department of Ecology (ECY).

17          11.    Riparian enhancements within the shoreline will include the planting of an 11,531  
18 square feet area with a native riparian tree/shrub mix; mulching and hydro seeding of a 11,422  
19 square foot area with native scrub/shrub mix; and the placement of 12 conifers, to be felled with  
20 root wads, within the designated shoreline of the project area. Wildlife nesting boxes will be  
21 placed throughout the project area to enhance wildlife viewing opportunities.  
22  
23  
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1           12.    The standard County spill prevention control and counter-measures plan will be  
2 utilized for this project. Spill kits will be onsite (within vehicles) to treat any chemical or fluid  
3 leaks during the project construction.

4           13.    Excavation will be monitored for potential contamination from off-site sources  
5 and/or past activities.

6           14.    No refueling of vehicles or equipment will be allowed within 150 feet of any  
7 waterbody.

8           15.    If an accidental spill occurs in the parking area during on-going operations of the  
9 day use area that would trigger a Washington State Department of Ecology (ECY) response (due  
10 to volume or type of material) Lewis County Facilities Department is responsible for the spill  
11 reporting/response/clean-up/disposal of materials according to ECY reporting guidelines.

12           16.    Clearing of invasive, noxious non-native vegetation in shoreline buffers is  
13 allowed by hand labor or with light equipment. Removal of noxious weeds as listed by the State  
14 in Chapter 16-750 WAC is allowed in a manner consistent with State Noxious Weed Control  
15 Board regulations. Native vegetation shall be promptly reestablished in the disturbed area.

16           17.    All areas that are cleared of vegetation in the shoreline or critical area buffers that  
17 are not developed will be replanted within one year with native plant.

18           18.    Replanted areas shall be planted and maintained such that within three years the  
19 vegetation cover is at least 90% reestablished.

20           19.    Non-native species on the County's list of invasive species shall not be allowed to  
21 be used to revegetate cleared areas.

1           20.    In advance of a predicted flood event, the facility will be temporarily closed to the  
2 public. Once the flood event is over and any flood waters have receded, Lewis County Facilities  
3 Department staff will evaluate the facility and repair any damage (with proper permits, if  
4 needed) before re-opening the facility to the public.

5           21.    Following a severe earthquake, Lewis County Facilities Department staff will  
6 temporarily close the facility to the public, evaluate any damage and repair any differential  
7 settlement within the facility (with proper permits, if needed) before re-opening the facility to the  
8 public.

9           22.    The review, issuance and construction activities of the building permits for 35-  
10 foot pedestrian bridge (B19-00630) and the pre-cast concrete ADA vault toilet facility (B19-  
11 00631) shall conform to applicable seismic analysis and all applicable design criteria of the  
12 International Building Code as part of the building permit review.

13           23.    The project development shall be in compliance with the conditions of approval  
14 of the flood development permit (FD19-00041) and the fill/grading permit (G19-00032).

15           24.    Park boundary signs shall be installed along the boundary lines to clearly identify  
16 the separation of public property from the adjacent private properties.

17           25.    The applicant shall undertake a minimum of 0.39 acres of vegetative plantings  
18 and hydroseeding (Planting Zone A and Hydroseeding Area) as shown in the Burden of Proof  
19 Statement – Appendix A – Site Development Plan.  
20

21           26.    Access gates and signs limiting the facility use to day-use hours of operation shall  
22 be installed prior to operation of the recreational facility. Per Lewis County Code (LCC) Section  
23 12.05.100, the operating hours of day-use parks are 8:00 a.m. to dusk seven days a week. Gates  
24

1 will be locked during non-operating hours. These hours may be seasonally adjusted so long as  
2 they remain day-use oriented.

3 27. Physical development of the recreational facility and all conditions of approval  
4 shall be complete/met prior to operation of the recreational facility.

5 28. The applicant shall implement a Construction Stormwater Pollution Prevention  
6 Plan (SWPPP) that satisfies the requirements of the NPDES General Permit for Stormwater  
7 Discharges Associated with Construction Activities. The SWPPP will include Best Management  
8 Practices (BMP) recommended by Ecology's 2019 Stormwater Management Manual for  
9 Western Washington and will include measures for temporary and permanent erosion and  
10 sedimentation control and will identify a regular inspection and maintenance schedule for all  
11 erosion control structures.

12 29. The temporary erosion and sedimentation control measures will be implemented  
13 at the beginning of the construction process.

14 30. BMPs will also include covering of exposed soils, managing runoff, and  
15 revegetating temporary disturbed soils as soon as possible following the onset of construction.

16 31. Prior to construction a spill prevention, control and containment (SPCC) plan will  
17 be in place, in accordance with applicable local, state and federal regulations.

18 32. The pre-cast concrete ADA vault toilet facility septic permit application (S19-  
19 00226) shall conform to the applicable design criteria of LCC 8.40, provide stamped designs by  
20 a Professional Engineer, and shall submit a management program to the health officer assuring  
21 ongoing operation, monitoring and maintenance before the health officer issues the installation  
22 permit. Verification of the health officer's approved management program shall be submitted to  
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25

1 the Building Official as documentation prior to the issuance of the building permit for the ADA  
2 vault toilet facility (B19-00631).

3 33. Written verification that the ADA vault toilet facility meets the criteria of LCC  
4 17.35A.880(4)(b)(i)-(v) shall be submitted to the Building Official as documentation prior to the  
5 issuance of the building permit for the ADA vault toilet facility (B19-00631).

6 34. A management plan prepared by a qualified professional to address fertilizer,  
7 herbicide, and pesticide management practices of the day-use park facility in relation to best  
8 management practices as recommended by the Cooperative Extension Service shall be provided  
9 to the Community Development Department prior to operation of the day-use facility.

10 35. Potentially harmful materials, including but not limited to oil, chemicals, tires, or  
11 hazardous materials, shall not be allowed to enter any body of water or wetland, or be discharged  
12 onto the land in shoreline jurisdiction, including any ditch, swale or other non-impervious  
13 surfaced area where migration to the aquifer is a reasonable likelihood. Potentially harmful  
14 materials should be stored outside of shoreline jurisdiction if feasible, and shall be maintained in  
15 safe and leak-proof containers.

16 36. Written verification the design of the stormwater facilities under the Lewis  
17 County Stormwater permit process includes review and compliance with LCC 17.35A.880(1)(b)  
18 and (1)(c), including but not limited to oil-water separator(s) for impervious surfaces, shall be  
19 submitted to the Community Development Department prior to the issuance of the preliminary  
20 approval of the stormwater permit and the issuance of the grading permit (G19-00032).

21 37. Herbicides, fungicides, fertilizers, and pesticides shall not be applied within 25  
22 feet of a water body, except by a qualified professional in accordance with State and Federal  
23 laws. Further, pesticides subject to the final ruling in Washington Toxics Coalition, et al., v. EPA

1 shall not be applied within 60 feet for ground applications or within 300 feet for aerial  
2 applications of the subject water bodies and shall be applied by a qualified professional in  
3 accordance with State and Federal law.

4 38. The non-motorized boat launch/ water access point location will be monitored and  
5 reassessed after significant flood events (5-year flood event or greater) by Lewis County  
6 Facilities Department staff. If at any time in the future the site is found to be unsafe or not  
7 functioning as intended, it is anticipated another location along the shoreline will be selected and  
8 the signage moved as appropriate. Any Memorandum of Agreement (MOA) for maintenance  
9 activities of this facility shall not transfer responsibility of the inspections of the safety and  
10 functionality of the access point or other site facilities.

11 39. Prior to the issuance of the grading permit (G19-00032) for the entire project, the  
12 applicant shall either obtain a Hydraulics Permit Application (HPA) approval from Washington  
13 State Department of Fish & Wildlife (WDFW) for the project or provide documentation from  
14 WDFW that an HPA is not required.

15 40. The boat launch/ water access point is a day-use facility only. No lighting shall be  
16 associated with this project.

17 41. The Lewis County Stormwater Permit shall review the design of the 24-foot wide  
18 access driveway and parking area as paved, not just gravel, as the applicant has indicated paving  
19 of these components could happen in the future if funding becomes available.

20 42. A signed copy of the memorandum of agreement (MOA) between Lewis County  
21 and the Packwood Improvement Club shall be submitted to the Community Development  
22 Department prior to the final approval of the grading permit (G19-00032) and prior to the  
23 operation of the day-use facility.



EXHIBITS

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- Exhibit 2 Affidavit of Publication
- Exhibit 3 Affidavit of Mailing
- Exhibit 4 Email from Karen Witherspoon to various parties regarding notice of documents to be entered into the record at the hearing
- Exhibit 5 Notice of Cancellation of Hearing
- Exhibit 6 Email/photos from Francie Jordan to Karen Witherspoon
- Exhibit 7 Email from Bonnie Muench to Karen Witherspoon dated September 25, 2020
- Exhibit 8 Email from Jeff St. Aubyn to Kare Witherspoon dated September 26, 2020 with attachments
- Exhibit 9 Letter from Barbara Wright
- Exhibit 10 Email from William Serahn to Karen Witherspoon dated September 28, 2020 with attachments
- Exhibit 11 Weckback presentation
- Exhibit 12 Written testimony of Lee Grose in lieu of oral testimony
- Exhibit 13 Lee Grose - Resubmittal of earlier written testimony
- Exhibit 14 William Serahan - Resubmittal of earlier written testimony
- Exhibit 15 Francie Jordan - Resubmittal of earlier written testimony
- Exhibit 16 Eric Eisenberg - Summary of concluding statements

# **COWLITZ COUNTY DECISION**

# Hillier, Scheibmeir, Kelly & Satterfield

299 N.W. Center Street  
 P. O. Box 939  
 Chehalis, WA 98532

Date	Invoice #
6/25/2019	13083

360-748-3386

**PAID**  
**07/15/2019**

Bill To  
 COWLITZ COUNTY  
 c/o ANGELA JORDAN  
 207 FOURTH AVE N  
 KELSO WA 98626

Matter
Bunker Hill

Date	Item	Description	Qty	Rate	Amount
6/10/2019	Scheibmeir	Review Staff Report	1	225.00	225.00
6/19/2019	Scheibmeir	Review additional materials	0.7	225.00	157.50
6/20/2019	Scheibmeir	Review court records; make site visit; prepare for and attend Hearing	4	225.00	900.00
6/24/2019	Scheibmeir	Prepare Decision	3.5	225.00	787.50

<b>Total</b>	\$2,070.00
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1 BEFORE THE COWLITZ COUNTY HEARINGS EXAMINER

2	IN RE:	)	HEARING NO. 1980.02
3	350 BUNKER HILL ROAD/STELLA'S	)	FINDINGS OF FACT,
	CHOICE, LLC,	)	CONCLUSIONS OF LAW
4	Applicant.	)	AND ORDER GRANTING
		)	VARIANCE

6 **APPLICANT:** Stella's Choice, LLC

7 **REPRESENTATIVE:**

8 Brian Hewitt  
 9 Brian L. Hewitt Engineering, LLC  
 10 3025 Maple Street  
 11 Longview, Washington 98632

11 **SUMMARY OF REQUEST:**

12 An after-the-fact variance for an existing "dry pond", allowing for a reduction from the minimum  
 13 50-foot front yard setback standard to approximately 30 feet. The existing dry pond provides  
 14 required water storage capacity for firefighting in the event of a fire at the existing recreational  
 15 marijuana production/processing facility located on the premises.

15 **LOCATION OF PROPOSAL:**

16 350 Bunker Hill Road, Longview, Washington. Tax Parcel No. 6258201, located in the  
 17 Northeast Quarter of Section 11, Township 8 North, Range 4 West, in the Southeast Quarter of  
 18 Section 2, Township 8 North, Range 4 West, Willamette Meridian.

18 **SUMMARY OF DECISION:**

19 The variance is **approved** subject to the requirement of constructing a site obscuring fence  
 20 described more fully below.

21 **BACKGROUND**

22 In 2016, the Applicant, Stella's Choice, LLC, applied for and received a "Tier 1"  
 23 Recreational Marijuana Growing and Processing Permit for a project to be located at 350 Bunker  
 24 Hill Road. The project site sits atop Bunker Hill several miles west of Longview in a scenic,  
 25 rural/suburban area. The site is surrounded by large lot rural residential properties in all

*Findings of Fact, Conclusions of Law  
 and Order Granting  
 Variance - 1*

**COWLITZ COUNTY HEARING EXAMINER**  
 299 N.W. CENTER ST. / P.O. BOX 939  
 CHEHALIS, WASHINGTON 98532  
 Phone: 360-748-3386/Fax: 748-3387

1 directions with the exception that immediately west of the project site, across Bunker Hill Road,  
2 is the historic Bunker Hill Cemetery.

3 Several neighbors and the Bunker Hill Cemetery Association felt aggrieved by the  
4 administrative approval of the Tier 1 Permit and commenced a LUPA action in the Cowlitz  
5 County Superior Court, Case No. 16-2-01261-3. In 2017, the Cowlitz County Superior Court  
6 ruled that the permit had been validly issued.

7 Thereafter the project proceeded toward construction and site layout designs were  
8 submitted to County Staff. Initial designs did not show a "dry pond" between the facility and  
9 Bunker Hill Road, but the final design identified a dry pond for firefighting purposes in close  
10 proximity to the road. The Applicant's engineer, Brian Hewitt, did not believe (and still does not  
11 believe) that the dry pond is a "structure" subject to the County's setback requirements.

12 Following submittal of the final plans to the County, Staff concurred with Mr. Hewitt that  
13 the dry pond was not a "structure" and therefore not subject to setback requirements. Staff  
14 approved the final design including both the construction of the production facility as well as the  
15 dry pond in close proximity to Bunker Hill Road.

16 The purpose of a "dry pond" is to provide onsite water storage for better firefighting  
17 capability in the event of a fire at a commercial structure when there are no fire hydrants nearby.  
18 As a commercial facility, the Applicant's production facility is required by the fire code to have  
19 onsite water storage to support firefighting efforts.

20 The constructed dry pond is 51 feet by 27 feet. It is constructed two feet below ground  
21 with a two-foot aboveground berm, creating four feet of water depth.

22 After construction of the dry pond, County Staff began to receive complaints about its  
23 close proximity to the County Road. Staff investigated and concluded that the dry pond had  
24 been constructed within the County's sixty-foot right-of-way. The Applicant was therefore  
25

1 required to relocate the dry pond several feet further east to where it is now outside of the County  
2 right-of-way, approximately thirty feet east of the centerline of Bunker Hill Road. At the time of  
3 this action County Staff remained of the belief that the dry pond was not a "structure" subject to  
4 the County's fifty-foot front yard setback requirement.

5 At the same time as the dry pond was relocated further east, the Applicant was also  
6 directed to relocate newly planted Cyprus trees between the perimeter fencing and the dry pond  
7 so as to increase the screening of both the dry pond and the production facility. Cyprus were  
8 chosen as a fast growing tree intended to provide significant screening within a relatively few  
9 number of years.

10 The current status of the dry pond is as follows: Commencing at the as-built eastern edge  
11 of Bunker Hill Road, there is a grassy area leading east to the property's perimeter barbed wire  
12 fence. Just inside (east) of this fence is the row of recently planted Cyprus, followed then by the  
13 dry pond. The dry pond is utilitarian in its appearance, with no landscaping and a visible pond  
14 liner covering its berm. The entire pond is enclosed within a haphazard array of fencing  
15 materials: the barbed wire fence to the west; gridded or "hog wire" fence to the south and north;  
16 and chain link fence to the east. The haphazard nature of the fencing, coupled with the non-  
17 landscaped pond, result in an unattractive appearance for both pond and fence, although much of  
18 it is currently hidden from view as a result of waist-high grass along the perimeter fencing.  
19 During those portions of the year where the grass is not as tall the pond will be more visible.

20 The relocated dry pond remains a significant concern to several neighbors and the  
21 Cemetery Association. They voiced their continuing concerns to County Staff who, on further  
22 analysis, concluded that the dry pond is a "structure" under CCC 18.10.040. It defines  
23 "structure" as "an object (including a mobile object) constructed or installed by persons  
24 including, but without limitation, buildings, towers, cranes, smoke stacks, *earth formations*, and  
25

1 overhead transmission lines." In other words, as an above-ground "earth formation", the dry  
2 pond is deemed a structure and therefore subject to the fifty-foot front yard setback.

3 In light of this determination, the Applicant seeks an "after-the-fact" variance from the  
4 fifty foot front yard setback requirement to allow the existing dry pond to remain in its current  
5 location. Several neighbors and the Cemetery Association challenge the request and argue that  
6 the application does not satisfy the County's requirements for a variance.

7 **PUBLIC HEARING**

8 The public hearing commenced at 2:30 p.m. June 20, 2019, in the Commissioner's  
9 Hearing Room in the County Administration Building. Sworn testimony was received from  
10 Jason Lugo and Ron Melin of County Staff, from the Applicant's representative, Brian Hewitt,  
11 and from several members of the public. All testimony was taken under oath.

12 Prior to the public hearing I undertook an independent site examination.

13 During the hearing several exhibits were received including the following:

- |    |           |   |
|----|-----------|---|
| 14 | Exhibit 1 | Revised County Staff Report including attachments.          |
| 15 | Exhibit 2 | Additional public comment received prior to the public      |
| 16 |           | hearing including letters from Jonathan and Danika Mark     |
| 17 |           | (in support); Harold Cockrell (in opposition); and          |
| 18 |           | representatives for the Bunker Hill Cemetery Association    |
| 19 |           | (in opposition).  |
| 20 | Exhibit 3 | Supplemental materials attached to Harold Cockrell's letter |
| 21 |           | including a copy of the Cowlitz County Superior Court       |
| 22 |           | Decision, etc.  |
| 23 | Exhibit 4 | Written comments of Elaine Cockrell.                        |
| 24 | Exhibit 5 | The original design layout for the project site ("Plan A"). |

- 1                   Exhibit 6                   Revised design layout showing dry pond ("Plan B").
- 2                   Exhibit 7                   Additional written comments from Harold Cockrell.
- 3                   Exhibit 8                   Written comments regarding the history of Bunker Hill
- 4   Cemetery provided by Harvey Williamson.
- 5                   Exhibit 9                   Correspondence between County Staff and Brian Hewitt
- 6   regarding redesign of the dry pond to its current location.
- 7                   Exhibit 10                  Email from Jason Lugo to the Hearing Examiner providing
- 8   the definition of "structure" as found in the Development
- 9   Code, CCC 18.10.040 as well as in the Recreational
- 10    Marijuana Code, CCC 18.76.030.
- 11                  Exhibit 11                  Photo taken from the County's PowerPoint presentation
- 12    during the hearing, depicting the site in its current summer
- 13    condition with tall grass obscuring the dry pond.

14                Jason Lugo and Ron Melin of County Staff testified to the somewhat complicated history  
 15 of this project and the need for the variance. Their testimony is consistent with the information  
 16 contained in the previous Background Section. Staff reviewed the five criteria for approving a  
 17 variance as found in CCC 18.10.355(c) as well as the additional requirements found in CCC  
 18 18.10.355(b), and concluded that all statutory requirements had been satisfied. Staff therefore  
 19 recommends that the requested variance be approved without further conditions.

20                Following the Staff's presentation, Brian Hewitt testified on behalf of the Applicant. Mr.  
 21 Hewitt has been a professional engineer for thirty-five years with a lengthy practice in Cowlitz  
 22 County. He has ten years' experience designing dry ponds for commercial projects in Cowlitz  
 23 County. Mr. Hewitt continues to believe that the dry pond is not a "structure" and should  
 24 therefore be exempt from the front yard setback requirements. In the alternative, if it is

25

1 concluded that the pond is a "structure", then Mr. Hewitt argues that it should be granted a  
2 variance to remain in its current location. He explains that the purpose of a dry pond is to  
3 provide a ready source of water for firefighting needs. The project site slopes downward from  
4 Bunker Hill Road with its highest elevation being at the road. Placing the dry pond as close to  
5 the road as possible serves multiple purposes: (1) being located above the commercial structure,  
6 it increases water pressure to the structure; (2) it is immediately available to firefighting  
7 apparatus from the road or from the site entrance; (3) its proximity to the road allows it to be  
8 easily used to assist in firefighting at other locations, creating a substantial benefit to nearby  
9 residents; and (4) if the pond had to be relocated the logical choice would be east and below the  
10 commercial building, making it more difficult to access and requiring its water to be pumped  
11 uphill to the building.

12 Mr. Hewitt argues that the pond is not a "structure" as the County has consistently  
13 interpreted its code to not impose setback requirements on similar earthen constructions, most  
14 notably above-ground septic systems. Indeed, if the County now considers all such installations  
15 to be "structures" then it must change its policies for the location of above-ground septic  
16 systems.

17 Mr. Hewitt concluded his testimony by noting that the fire district specifically requested  
18 the dry pond in its current location as it serves as its optimum site for both the project and the  
19 neighborhood, with many challenges associated with any other location. Mr. Hewitt also noted  
20 that the Cyprus trees planted in front of the pond are rapidly obscuring it from the public's view.

21 Following presentation by Mr. Hewitt the hearing was opened to public testimony.  
22 Elaine Cockrell first testified in opposition to the requested variance. Mrs. Cockrell asserts that  
23 the purpose of this setback requirement is to avoid an imposition on neighbors, and that the dry  
24 pond is an imposition to her and other neighbors. She asserts that the Applicant has the burden  
25

1 of proving the requirements of CCC 18.10.355(c). She adds that the Cyprus trees, which are  
2 eight feet apart, fail to block the view of the pond, taking away the scenic beauty of the adjoining  
3 cemetery.

4 Mrs. Cockrell's husband, Harold Cockrell, next testified. Mr. Cockrell had earlier  
5 submitted written comments and a large amount of material relating to the earlier administrative  
6 permit. He supplemented these earlier materials with additional written comments and other  
7 documents (Exhibits 5-7). He argues that allowing the variance would materially compromise  
8 the goals of the County's Comprehensive Plan as well as the Marijuana Facility Siting  
9 Ordinance, Chapter 18.76. Mr. Cockrell is upset that the intended location of the dry pond was  
10 not revealed in the Applicant's plans until well into the design process with the result being that  
11 this issue was not one of the matters reviewed by the Cowlitz County Superior Court Judge. He  
12 concludes that the requested variance is yet another opportunity for the Applicant to get what it  
13 wants without there being a fair and full hearing.

14 Susan Fuhrman was the next person to testify. Ms. Fuhrman resides at 191 E. McAdams  
15 Road immediately east of the project site. She views the matter as "not a big deal" and sees no  
16 reason why the variance should not be granted as requested. She also believes that in just a few  
17 years the Cyprus trees will fully obscure any public view.

18 Following Ms. Fuhrman's testimony Harvey Williamson, testified. Mr. Williamson's  
19 testimony was not directly in opposition to the requested variance but was instead a history  
20 lesson on the Bunker Creek Cemetery and its cultural and historical significance to the Stella  
21 Community. Mr. Williamson's testimony was then submitted in written form as Exhibit 8.

22 At the conclusion of the public testimony Mr. Hewitt responded on behalf of the  
23 Applicant to portions of Mr. Cockrell's testimony. Mr. Hewitt explained that the reason the dry  
24 pond was not identified in the first design layouts was not to avoid its notice but simply because  
25

1 plans for utilities (including dry ponds) are not submitted until final building approval. He then  
2 reiterated his belief that the dry pond serves a significant community function in its current  
3 location by being readily available for use should any neighboring property experience a fire.

4 **ANALYSIS**

5 There appears to be a common assumption that the requested variance enjoys an  
6 advantage merely because it is already in existence, and because it had earlier been (incorrectly)  
7 approved by County Staff. Neither assumption is correct. This application is being reviewed as  
8 if the existing dry pond had never been constructed and the Applicant was seeking to construct it  
9 for the first time. The fact that the Applicant could be forced to move the existing facility is not a  
10 factor in the decision making except to the extent that its relocation would have an impact on one  
11 of the factors required to be proven in order to be granted the variance.

12 The requested variance has caused a difference in opinion among the surrounding  
13 neighbors. Neighbors to the east (Fuhrman) and north (Mark) have given the project their full  
14 support while neighbors to the south (Cockrell) and west (Cemetery) remain strongly opposed.  
15 Supporting neighbors wonder what the fuss is about while opposing neighbors feel that the pond  
16 is an affront to the historic cemetery across the street.

17 With the grass along the property's fenceline at its summer peak, the pond is barely  
18 visible from public view. Unfortunately, this status will soon change when the summer ends and  
19 the grass is no longer site obscuring. Recently planted Cyprus trees will eventually provide a  
20 vegetative buffer but this will take many years. In the meantime, and when the grass is not so  
21 tall, the barren pond and its haphazard fencing are an unsightly blemish immediately across from  
22 the entrance to a historic cemetery.

23 I conclude that the dry pond, in its current location, serves several important functions  
24 that justify its retention. The current site provides maximum water pressure, the greatest  
25

1 convenience to firefighters, and a community-wide benefit of available water to fight fires on  
2 other properties. Conversely, relocating the pond to a location outside the setback would lessen  
3 the ability to use this water for firefighting onsite; would make the firefighters job more difficult;  
4 and would preclude the pond's use for fires on neighboring properties. At the same time,  
5 however, the pond is a visual eyesore, especially to the historic cemetery across the street, as  
6 long as the pond remains visible to the public. The solution is to grant the variance but on the  
7 condition that the dry pond must be screened from public view by a solid fence, at least four feet  
8 in height, along the north, west and south sides of the pond (a fence along the east side will not  
9 obscure the pond and therefore is optional). The fence must be made of wood unless County  
10 Staff approves an alternate material having at least equal site obscuring qualities and aesthetics.  
11 On the west side of the pond the fence is to be located between the pond and the existing Cyprus.  
12 The fence must be constructed within ninety days.

13 Subject to this condition the requested variance will satisfy the various criteria of CCC  
14 18.10.355.

15 Accordingly, I make the following:

16 **FINDINGS OF FACT**

17 **General Findings.**

18 1. All Findings of Fact contained in the previous Background, Public Hearing and  
19 Analysis Sections are incorporated herein by reference and adopted by the Hearing Examiner as  
20 his own Findings of Fact.

21 2. The Applicant requests a variance from the minimum 50-foot front yard setback  
22 standard to approximately thirty feet, allowing the retention of an existing dry pond required for  
23 fire suppression purposes.

24  
25  
*Findings of Fact, Conclusions of Law  
and Order Granting  
Variance - 9*

**COWLITZ COUNTY HEARING EXAMINER  
299 N.W. CENTER ST. / P.O. BOX 939  
CHEHALIS, WASHINGTON 98532  
Phone: 360-748-3386/Fax: 748-3387**

1           3.       The project site is located at 350 Bunker Hill Road near Longview. The project  
2 site adjoins Bunker Hill Road and the existing dry pond is approximately thirty feet east of the  
3 centerline of Bunker Hill Road.

4           4.       The project site consists of 5.31 acres. It is unzoned and designated as "Rural" in  
5 the County Comprehensive Plan.

6           5.       Adjoining properties generally consist of large lot suburban/rural residential  
7 properties with the exception that the Bunker Hill Cemetery is immediately west of the project  
8 site across Bunker Hill Road.

9           6.       The site is used as an approved Marijuana Production Facility. As a commercial  
10 activity, this production facility is required to have onsite water storage to assist in firefighting  
11 needs. The dry pond at issue provides this service and has been designed to meet fire code  
12 requirements.

13          7.       The dry pond is 51 feet long by 27 feet wide and is located approximately thirty  
14 feet from the centerline of Bunker Hill Road. The pond is four feet deep consisting of two feet  
15 below grade and a two foot high berm above-ground.

16          8.       The pond and its berm are covered by a dark colored pond liner. There is no  
17 landscaping surrounding the pond.

18          9.       The pond is surrounded on all sides by various types of fencing: west of the  
19 pond, separating the property from Bunker Hill Road, is a longstanding barbed wire fence; north  
20 and south of the pond are "hog wire" fences; and east of the pond is a chain linked fence. All of  
21 these fences connect to each other but have a very haphazard appearance.

22          10.      This haphazard fencing, coupled with the lack of landscaping surrounding the  
23 pond and its berm, result in a visually unattractive feature in close proximity to Bunker Hill Road  
24 and the Bunker Hill Cemetery immediately across the street.

25  
*Findings of Fact, Conclusions of Law  
and Order Granting  
Variance - 10*

**COWLITZ COUNTY HEARING EXAMINER  
299 N.W. CENTER ST. / P.O. BOX 939  
CHEHALIS, WASHINGTON 98532  
Phone: 360-748-3386/Fax: 748-3387**

1           11.     The Applicant has planted some Cyprus between the barbed wire fence and the  
2 dry pond to aid in its visual screening. These trees have been chosen for their fast growing  
3 tendencies but they are at least several years away from providing an effective screen of the dry  
4 pond.

5           12.     A site obscuring fence of wood or similar, aesthetically pleasing material would  
6 provide effective screening of the dry pond and eliminate the existing haphazard fencing.

7           Findings Relating to CCC 18.10.355(c)(1).

8           13.     The variance will not be materially detrimental to public health, or injurious to  
9 property in the vicinity or district in which the property is located.

10          14.     The dry pond is necessary for complying with County Fire Code and Building  
11 Code requirements.

12          15.     The current location of the dry pond maximizes its effectiveness for use on the  
13 property while also allowing it to be used in the event of fires on neighboring properties. Its  
14 location is therefore beneficial to the public health and to properties in the vicinity.

15          16.     As conditioned through additional fencing, the dry pond will not have any  
16 materially detrimental impact to surrounding properties including the cemetery directly across  
17 the road.

18           Findings Relating to CCC 18.10.355(c)(2).

19          17.     The requested variance will not detract from livability or appearance of a rural  
20 residential area, or character of a nonresidential area.

21          18.     The surrounding area is residential with the exception of Bunker Hill Cemetery.  
22 The dry pond, as conditioned, will not detract from the livability or appearance of the  
23 surrounding properties, and will provide additional firefighting capability in the event one of the  
24 surrounding properties suffers a fire.

1           Findings Relating to CCC 18.10.355(c)(3).

2           19.     The variance will not adversely effect significant natural, scenic, historic, cultural,  
3 open space, or energy resources.

4           20.     The Bunker Creek Cemetery is a historic cemetery and is both a historic and  
5 cultural resource.

6           21.     As conditioned, the dry pond in its current location will not adversely effect the  
7 cemetery as the pond will become obscured from view.

8           Findings Relating to CCC 18.10.355(c)(4).

9           22.     The variance will not materially compromise the goals and policies of the  
10 Comprehensive Plan, or the spirit of this chapter.

11           23.     The project site is designated as rural in the County Comprehensive Plan. The  
12 project site has previously been approved as a Tier 1 Marijuana Production Facility. The dry  
13 pond is a necessary requirement of the County's fire and building codes to ensure the safety of  
14 persons and property in the event of a fire at this site. The Cowlitz County Comprehensive Plan  
15 recognizes and encourages small scale commercial and industrial uses in rural settings. The  
16 existing dry pond ensures the safe use of a small scale commercial/industrial use in this rural  
17 setting.

18           Findings Relating to CCC 18.10.355(b)(1).

19           24.     Unusual circumstances are applicable to the subject property, most notably its  
20 topography. The site slopes downward from Bunker Hill Road. The most effective location for  
21 a dry pond is at a higher elevation than the existing production facility. This allows greater water  
22 pressure and easier access by firefighting personnel.

23           25.     If not allowed to remain at the existing location, the dry pond would need to be  
24 relocated below the existing production facility. Water from the pond would then have to be  
25

1 pumped uphill to assist in firefighting. Firefighting personnel would have greater difficulty  
2 reaching and utilizing this water source.

3 26. For these reasons the Regional Fire District encourages the continued use of the  
4 current site for the dry pond.

5 Findings Relating to CCC 18.10.355(b)(2).

6 27. Strict application of Chapter 18.10 CCC would deprive the Applicant of property  
7 rights and privileges enjoyed by others in the vicinity.

8 28. Without the dry pond in its current location the existing use would not enjoy the  
9 same firefighting abilities as surrounding properties.

10 29. The County has historically interpreted the term "structure" to not include earthen  
11 structures, including above-ground septic designs. Applying a much stricter interpretation to this  
12 project would deprive the Applicant of property rights and privileges which have been enjoyed  
13 by other landowners who have been benefitted from a more generous interpretation to date.

14 Findings Relating to CCC 18.10.355(d).

15 30. When granting a variance adverse impacts resulting from the variance shall be  
16 mitigated to the extent practicable.

17 31. The only significant adverse impact of the requested variance is that the existing  
18 dry pond and surrounding fencing is visually unattractive, especially to the Bunker Hill  
19 Cemetery immediately across the road. This adverse impact will be mitigated through the  
20 condition that a site obscuring fence be constructed, thereby obscuring the dry pond from public  
21 view and eliminating the current haphazard fencing that surrounds it.

22 Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

23 **CONCLUSIONS OF LAW**

24 1. The Hearing Examiner has jurisdiction over the parties and the subject matter.

25 *Findings of Fact, Conclusions of Law  
and Order Granting  
Variance - 13*

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Phone: 360-748-3386/Fax: 748-3387**

1           2.     Any Conclusions of Law contained in the foregoing Background, Public Hearing,  
2 Analysis, or Finding Sections are incorporated herein by reference and adopted by the Hearing  
3 Examiner as his own Conclusions of Law.

4           3.     Any Finding herein which may be deemed a Conclusion is hereby adopted as  
5 such.

6           4.     The existing dry pond is an earth formation constructed or installed by persons  
7 and, therefore, is a "structure" as defined by CCC 18.10.040.

8           5.     As a structure, the dry pond must comply with the County's setback requirements  
9 unless a variance has been granted.

10          6.     The requested variance, as conditioned, will not constitute a grant of special  
11 privileges inconsistent with the limitations upon uses of other property in the vicinity and land  
12 use classification which the property is located.

13          7.     The Applicant has provided substantial evidence of unusual circumstances that  
14 are applicable to the subject property including its size, shape, topography, surroundings, or  
15 location. CCC 18.10.335(b)(1).

16          8.     The Applicant has provided substantial evidence that the strict application of this  
17 chapter would deprive the Applicant of property rights and privileges enjoyed by others in the  
18 vicinity. CCC 18.10.355(b)(2).

19          9.     Pursuant to CCC 18.10.355(c):

20           1.     As conditioned, the variance will not be materially detrimental to public  
21 health, or injurious to property in the vicinity or district in which the property is located.  
22

23           2.     As conditioned, the variance will not detract from livability or appearance  
24 of a rural residential area, or character of a nonresidential area.  
25

*Findings of Fact, Conclusions of Law  
and Order Granting  
Variance - 14*

**COWLITZ COUNTY HEARING EXAMINER  
299 N.W. CENTER ST. / P.O. BOX 939  
CHEHALIS, WASHINGTON 98532  
Phone: 360-748-3386/Fax: 748-3387**



1 DATED this \_\_\_\_\_ day of June, 2019.

2  
3 \_\_\_\_\_  
4 Mark C. Scheibmeir  
5 Cowlitz County Hearing Examiner  
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*Findings of Fact, Conclusions of Law  
and Order Granting  
Variance - 16*

**COWLITZ COUNTY HEARING EXAMINER  
299 N.W. CENTER ST. / P.O. BOX 939  
CHEHALIS, WASHINGTON 98532  
Phone: 360-748-3386/Fax: 748-3387**



January 30, 2026

Tim Smith  
Director, Community Planning and Economic Development  
City of Olympia  
601 4th Ave E  
Olympia, WA 98507-1967

Re: Statement of Qualifications for Hearing Examiner Services

Thank you for considering me as a hearing examiner for the City of Olympia. It would be a great honor to serve as its Hearing Examiner. My proposal is for the primary or alternate examiner position.

In summary, I have conducted over 2,000 land use hearings as a hearing examiner since the 1990s. I serve as Hearing Examiner for thirty-three municipalities, as alternate Hearing Examiner for two municipalities and City Attorney for two others. As detailed in my proposal below, I am regularly requested to conduct hearings on the most complex and controversial hearings in Washington State.

My hourly rate is \$230 per hour. My attorney subcontractor rates are 90% of my rate and planner subcontractors 75% of my rate. I have a team of seasoned subcontractors with decades of experience between them. I would conduct all the hearings for the City except for rare instances of scheduling conflicts. I'm immediately available to begin work for the City on any day preferred by the City.

I've included two recent writing samples to demonstrate the range of my decision making. One involves a routine plat decisions that was billed for a few hundred dollars. The other was for a five-day SEPA appeal hearing that cost a bit more.

I'm already mentoring and training several individuals for hearing examiner work and am happy to continue to do so.

Thank you for your consideration of my proposal.

*Phil Olbrechts*

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Phil Olbrechts  
Olbrechts and Associates, PLLC Managing Member



## **HEARING EXAMINER STATEMENT OF QUALIFICATIONS**

Please accept this as my Statement of Qualifications to provide hearing examiner services to the City of Olympia, as managing member of Olbrechts and Associates, PLLC. Based upon historical performance, I would probably conduct over 90% of the hearings assigned to me by the City of Olympia. In very rare circumstances I would seek permission from the City for an alternate examiner to fill in if I have an unexpected conflict with a previously scheduled hearing.

### **Qualifications and Experience**

#### **A. Overview:**

I have represented cities as a city attorney since 1989 and have held hearing examiner contracts since 1997. I currently serve as Hearing Examiner for Auburn, Medina, Mercer Island, Federal Way, Fife, Mason County, Monroe, Mount Vernon, Langley, Newcastle, Port Townsend, Mountlake Terrace, Mill Creek, Algona, Fircrest, Edmonds, Renton, Puyallup, Dupont, Roy, Sumner, Bainbridge Island, Ruston, Port Orchard, Kitsap County, Tukwila, Blaine, Lacey, Bonney Lake (Appellate Examiner), Oak Harbor, Orting, Mukilteo and Burien and as an alternate examiner for Seattle Public Schools and Snohomish County. I have conducted over 2,000 hearings in the past twenty-eight years. I also serve as City Attorney for Buckley and Index. Working with planning staff of these cities daily gives me a unique understanding of how hearing examiner decisions are implemented at the staff level.

As a hearing examiner I have held hearings on every type of land use issue and permit imaginable, with projects ranging in size from removal of utility easements from Mason County subdivisions to the Villages and Lawson Hills Master Plan Developments in Black Diamond. I have the resources to handle cases of any size and complexity. As one example, the Villages and Lawson Hills Master Plans involved the construction of over 6,250 dwelling units, mostly composed of single-family homes, and over a million square feet in commercial space. Valued at over a billion dollars, the master planned communities were the largest residential development ever reviewed in King County. The hearings took over 40 hours and involved more than 3,000 pages of exhibits. The decision (EIS adequacy) and recommendations (master plan and development agreement) were issued in the requisite ten days from the close of the hearing without extensions. I've also held hearings on large master plan developments for Mount Vernon, Renton and Jefferson County and served as City Attorney in master plan developments in Poulsbo and Milton. I held a multi-day hearing on a 500-acre motorsports facility for Snohomish County involving over 600 public comment letters, an all-day hearing in Mason County for a racetrack and a hearing on the PSE Energize Eastside project. Some of my more recent contentious hearings include the redevelopment of the Weyerhaeuser campus for Federal Way, a regional methadone clinic in Sequim and a proposed 60-acre gravel pit in Belfair.

In years past as a land use attorney, I have represented neighborhood groups and developers on land use issues. I've represented parties in all levels of the courts, including the United States Supreme Court, the Growth Management Hearing Board, and the Shoreline Hearings Board

## **B. Career Development:**

I received a B.S. in molecular biology from the University of Washington in 1986 and a J.D. with honors from Seattle University School of Law in 1989, the year I was admitted into practice. After stints as City Attorney and Planning Director of Forks, Washington (1991-94), and Planning Director of Sequim (1994), Washington, I became an associate at Ogden Murphy Wallace, P.L.L.C. (“OMW”) in 1994. I left OMW for three years in 1997 to teach land use law in the graduate planning program at the University of Washington and to work on other projects. During that time, I developed my hearing examiner practice, working for Mount Vernon, McCleary, and Shelton. I passed those clients on to my alternate examiner and returned to OMW in 2000 as *of counsel*, where I subsequently became a partner in 2004. In my time at OMW I served as City Attorney for Monroe, Buckley, Milton, Gold Bar, Index and Carnation. OMW had over forty attorneys and I worked in the firm’s municipal department, where I had the privilege of collaborating with the state’s best municipal attorneys on land use issues. I was elected to OMW’s executive board, where I managed the firm as the partner representing the firm’s municipal department.

I established Olbrechts and Associates, PLLC on November 1, 2010 to maintain competitive rates for my clients. Hearing examiner compensation rates are not feasible with the overhead expenses of major Seattle law firms. Over 90% of my practice is devoted to examiner services. The remaining portion of my practice is primarily composed of providing land use services to city attorney clients. As a hearing examiner, I currently conduct five to fifteen hearings per month.

## **C. Expertise:**

**Land Use Law.** I’m fully up to date on the leading edge of developing land use law due to the numerous land use seminars and courses I teach each year. I present two land use case law update webinars every year for the Municipal Research Services Center for an audience of a couple hundred planners, attorneys and municipal officials. I created and presented the land use “boot camps” for the Planning Association of Washington. Those camps involve a day long program of legal presentations on topical land use issues and “bread and butter” training on recurring land use issues. I’ve done several dozen land use case law presentations at professional conferences throughout the state. I’ve written several land use articles for organizations such as the Municipal Research Services Center and the Washington State Bar Association (“WSBA”). I have co-chaired the yearly conference of the Environmental and Land Use Law Section of the WSBA. I’ve also taught several credits of land use law in the graduate program at the University of Washington Department of Urban Design and Planning, covering both constitutional law and Washington’s land use statutory framework. I’ve presented a couple hundred “short courses” for planners and local officials across the state on behalf of the Washington State Department of Commerce to educate local officials on planning and open government laws. Because of this extensive involvement in developing case law, my land use decisions are always consistent with developing judicial and legislative requirements.

Over the years I’ve worked with dozens of local land use codes. As a city attorney I’ve been responsible for the legal review of major code updates, including the land use codes of Edmonds, Monroe, Milton,

Buckley, Index, Gold Bar, Poulsbo and Carnation. As a Hearing Examiner for multiple jurisdictions I've become familiar with those codes as well. For twenty years I have also advised on local code compliance issues to my city attorney clients.

Through my extensive involvement in public education on land use law, I've developed a focus upon my favorite topics – constitutional takings and vesting law. Through my work I've been asked to testify at the state legislature on vesting legislation and I've made numerous presentations on how to write and implement “reasonable use” standards for critical area ordinances.

I've held hearings on hundreds of administrative land use appeals, including SEPA, code enforcement and impact fees. I've done extensive design review hearings for cities with excellent design standards such as Mercer Island, Edmonds, Renton and Kirkland. I have a couple years of engineering education from the University of Washington that I enjoy applying in adjudicating public works issues.

**Environmental Law.** My science education enables me to critically assess the scientific evidence that is often disputed in environmental proceedings. I have ruled upon and participated in dozens of SEPA appeals (threshold determinations and EIS adequacy), critical area ordinance reasonable use hearings and compliance issues with the National Environmental Policy Act.

**Shoreline Management Act.** I have issued hundreds of shoreline decisions for Mason County, San Juan County and the City of Edmonds. Some of my decisions have been appealed to the Shoreline Hearings Board. All decisions have been sustained. Through this work I've accumulated a significant amount of knowledge on shoreline issues, such as aesthetic impacts, shading impacts and protection of endangered fish and eelgrass and kelp.

**Code Enforcement.** I've been involved in dozens of code enforcement hearings, either as a hearing examiner, city attorney or prosecutor. The code enforcement hearings include dangerous building appeals, zoning code violations, building code violations, stormwater violations and health department violations (including solid waste violations and junk vehicle abatement). I've also written or updated several code enforcement ordinances as a city attorney.

**Other Hearings.** As a hearing examiner, I've conducted hearings and issued decisions on dangerous dog appeals, street vacations, vehicle impounds, drug property and sex crime forfeitures, rental housing violations, local improvement district formation, building code appeals and business license revocations. As a city attorney, I've been involved in the full spectrum of hearings held by city councils.

**Local Project Review Act:** As a former and current City Attorney for several cities I've been responsible for preparing revisions to local zoning codes to conform to the Local Project Review Act in its initial adoption in 1995 and its more recent revisions.

### **Method and Approach**

My objectives as a hearing examiner are to maintain a hearing process that inspires trust in its competency and integrity. I believe that unlike the judicial system, local review processes are designed to be accessible to the public. Participation shouldn't require the training of a lawyer to be effectively heard. I seek to create a system that is accessible and responsible to the public and provides a fair opportunity for all hearing participants to

express their concerns and have them addressed in a meaningful way. I'm always vigilant in road mapping hearings for citizens and am constantly inquiring whether hearing participants understand the process. If hearing comments do not appear to be relevant, I will explain the relevant criteria and will work with the hearing participant(s) on ensuring that relevant concerns are placed within the proper regulatory context.

The most challenging part of my hearing examiner practice is making administrative appeals accessible to pro se appellants. There is a fine line between assisting someone in an appeal while at the same time not being perceived as taking sides by making their case for them. I focus upon explaining options and responsibilities while avoiding making any recommendations that could be construed as making a case for a party.

Although I'm naturally inclined to want to help people, I've also come to understand that control and order are sometimes necessary to protect hearing participants. In highly adversarial proceedings where testimony can sometimes get personal and some may try to dominate a proceeding, I've developed substantial experience in ensuring that everyone is still able to be heard and that no one feels intimidated from seeking that opportunity.

The objectives of my written decisions and recommendations are similar to those of the hearing process. My goals are to issue decisions that are: (1) legally bullet-proof; (2) fair; (3) responsive to the concerns of hearing participants; (4) understandable to lay persons; (5) consistent with past decisions, (6) successful in mitigating all impacts to the extent legally permissible, and (7) reflective of the values of the community as identified in the comprehensive plan and applicable code provisions. I attempt to ensure that all public concerns are individually addressed in my decisions. As shown in my preliminary plat writing sample, I often focus on neighborhood concerns in the introduction section to ensure my responses are easily accessible to the public.

My decisions are thorough. I recognize that courts give deference to the factual findings of an Examiner as well as the Examiner's interpretation of local ordinances. However, a court cannot provide this deference unless the decision makes very clear what findings and interpretations are made. Also, I will have far more expertise in land use law than any reviewing judge. For these reasons, I provide a detailed written analysis of all significant legal and factual issues, quoting every applicable regulation and precisely identifying why a code criterion is satisfied or not satisfied. This thorough writing style leaves no room for reasonable disagreement from a reviewing judge and provides clarity to all hearing parties.

I primarily rely upon subcontractors for any assistance I need in writing decisions, which is rare. I review all of their work and it's rare anything gets past me without some revision. As previously mentioned, I was able to write a decision on the Black Diamond master plan applications within the requisite ten business days despite the 3,000 pages of exhibits and 40 hours of testimony. I did this by hiring a half dozen planners to help me assess and evaluate the factual issues of that project. I have repeatedly addressed many of the largest and most controversial projects in the Puget Sound area and have never had any problem meeting deadlines and workloads with high quality written decisions and effective resolutions. I am happy and prefer to work exclusively with electronic documents. I handle scheduling myself.

### **Compensation**

My hourly rate is \$230/hour. The rate for planners such as Ms. Terrell would be 75% of my rate and other I would also seek reimbursement for hearing transcription costs. I currently use Rev.com, which charges \$0.25/minute of hearing. I also request reimbursement for City business license fees. 1.0 hour of travel would be assessed for in-person hearings.

The invoices for my writing samples show variety in my hourly rates. This is only because I didn't raise any of my rates for the first 15 years or so of conducting my examiner practice. In the last couple years I've started increasing rates to keep up with inflation. I generally increase my rate by \$5 for every new client. A couple of my newest clients are charged \$225/hour.

### **Alternate Examiners and Decision Writers**

I rely upon several contractors to ensure that my decisions are timely and complete. I extensively use several retired planning directors given their extensive experience in land use work and addressing community concerns. Including Ms. Terrell, I currently have three retired planning directors working for me and I'm talking to two others. Hearing examiner work is an ideal means for the public to benefit from the life work of these individuals. As a person who has spent hundreds of hours teaching the public about land use law, I truly enjoy the collaboration involved in working with these skilled individuals.

Emily Terrell is my primary subcontractor. She is the Principal of Sound Municipal Consultants, a planning and municipal consulting firm. Emily is a consulting planner and hearing examiner. Until recently she was the planning director of the City of Buckley. She has also served as my alternate examiner since at least 2011 and has also served as the Hearing Examiner for Pacific County, WA. Ms. Terrell is available to hold hearings in the very rare circumstances when necessary due to scheduling error, illness or conflict of interest preventing Mr. Olbrechts from conducting the hearing.

### **Availability**

I can generally accommodate any hearing date, day or night, with a preference for Tuesdays and Wednesdays for in-person hearings.

### **Professional References**

Vanessa Dolbee  
Director, Community and Econ. Dev.  
City of Lacey  
420 College Way  
Lacey, WA 98503  
Phone (360) 491-5642  
vdolbeee@ci.lacey.wa.us

Chris Larson  
Director, Community Development  
City of Fife  
5411 23<sup>rd</sup> St. E  
Fife, WA 98424  
Phone: (253) 778-3484  
clarson@cityoffife.org

Kell Rowen  
Administrator, Community Development  
Mason County  
615 Alder St.  
Shelton, WA 98585  
Phone (360) 427-9670, ext. 286  
KRowen@masoncountywa.gov

**OLBRECHTS AND ASSOCIATES, PLLC**  
**720 N. 10th St., A #297**  
**Renton, WA 98057**  
**olbrechtslaw@gmail.com**

*Phil A. Olbrechts*

INVOICE

DECEMBER 2025 HEARING EXAMINER SERVICES

**JANUARY 18, 2026**

**TO:**

Kell Rowen, DCD Administrator  
615 West Alder Street  
Shelton, WA 98584

Total Invoice: \$1,069.00

Per Case

Walker Plat – \$708.50  
Oakes Plat – \$326.50  
Rabenstein Easement – \$34.00

DESCRIPTION	HOURS	RATE	DATE
<b>Phil Olbrechts</b>		170.00/hr	
Prep for Walker performance subdivision and hearing	1.2		11/26/25
Prep for Oakes performance and hearing	0.3		12/10/25
Prep of Walker performance subdivision	2.9		12/19/25
Prep of Oakes performance	1.6		12/25/25
Prep of Rabenstein easement elimination	0.2		1/9/26
<b>TOTAL OLBRECHTS</b>	<b>6.2</b>	<b>\$1,054.00</b>	
Walker Performance trans		\$11.50	
Oakes Performance trans		\$3.50	

**OLBRECHTS AND ASSOCIATES, PLLC**  
**720 N. 10th St., A #297**  
**Renton, WA 98057**  
**olbrechtslaw@gmail.com**

*Phil A. Olbrechts*

**DECEMBER 2025 HEARING EXAMINER SERVICES**

**JANUARY 18, 2026**

**TO:**

Alex Wenger  
 Director, Dept. of Community Development Services  
 City of Blaine  
 435 Martin, Suite 3000  
 Blaine, WA 98230

Total Invoice: \$ 11,057.75

DESCRIPTION	HOURS	RATE	DATE
Phil Olbrechts		\$180/hr	
Prep of Avista	4.8		12/29/25
Prep of Avista	6.8		12/30/25
Prep of Jerome St. transcript	0.1		12/30/25
Prep of Avista	6.9		12/31/25
Prep of Avista	7.8		1/1/25
Prep of Avista	6.2		1/2/25
Prep of Avista	8.0		1/3/25
Prep of Avista	7.3		1/4/25
Prep of Avista	4.1		1/5/25
Proof and revisions to Avista	0.2		1/6/25
Total Olbrechts	52.2	\$ 9,396.00	
Emily Terrell		\$135/hr	
Jerome prep and hearing	1.8		12/17/25

Prep of Jerome	1.6		12/30/25
Prep of Jerome	3.9		1/5/26
Prep of Jerome	4.9		1/6/26
Total Terrell	12.2	\$1,647.00	
Jerome St. Trans		\$14.75	
TOTAL INVOICE		\$ 11,746.25	





# CITY OF BLAINE

## COMMUNITY DEVELOPMENT SERVICES DEPARTMENT

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435 MARTIN STREET, STE. 3000 • BLAINE, WA • 98230

PHONE: (360) 332-8311 • FAX: (360) 543-9978 • WEBSITE: [www.cityofblaine.com](http://www.cityofblaine.com)

## NOTICE OF FINAL DECISION

### Avista at Birch Point Planned Unit Development and Preliminary Plat and SEPA Appeal

On January 26, 2026, the Blaine City Council approved Ordinance 26-3041, a Final Decision on the Avista at Birch Point Planned Unit Development, Preliminary Plat, and SEPA appeal. A copy of the ordinance and supporting Hearing Examiner recommendation are attached. You are receiving this notice because you are a party of record or other interested party.

**Appeals:** Type II-CC final decisions are subject to judicial appeal as provided in BMC 17.06.190. Pursuant to BMC 17.06.190, Type II final decisions made by the City Council shall be final and conclusive unless an appeal is made to Whatcom County superior court within 21 days of the date the decision or action became final by filing both a petition for review in the Whatcom County superior court and serving the petition on all necessary parties in conformity with the requirements of the State Land Use Petition Act, Chapter 36.70C RCW.

**ORDINANCE NO. 26-3041****AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BLAINE, WASHINGTON, RENDERING A FINAL DECISION REGARDING THE AVISTA AT BIRCH POINT PROJECT, DENYING THE AVISTA AT BIRCH POINT SEPA APPEAL, AND APPROVING THE AVISTA AT BIRCH POINT PLANNED UNIT DEVELOPMENT AND PRELIMINARY PLAT**

**WHEREAS**, the Avista at Birch Point Planned Unit Development (PUD) and Preliminary Plat applications (Project) were determined to be complete applications by the Community Development Services Department (CDS) on May 15, 2024;

**WHEREAS**, the CDS Director issued a State Environmental Policy Act (SEPA) Mitigated Determination of Nonsignificance (MDNS) for the Project on June 25, 2025;

**WHEREAS**, the SEPA MDNS for the Project was appealed by Whatcom County and the Blaine Water Coalition within the 14-day appeal period after the SEPA MDNS was issued as later determined by the City Hearing Examiner;

**WHEREAS**, Whatcom County withdrew their SEPA appeal in advance of the hearing before the Hearing Examiner;

**WHEREAS**, the Blaine Water Coalition SEPA appeal was consolidated with the PUD and preliminary plat into a single hearing scheduled before the Hearing Examiner on November 5, 2025;

**WHEREAS**, the Hearing Examiner held a duly noticed public hearing consisting of five days of testimony between November 5-14, 2025; reviewed the Project applications; considered the merits of the SEPA appeal; considered the CDS recommendation; and considered public testimony, including written comments, and exhibits submitted at the public hearing, all as further detailed in the Hearing Examiner's written recommendation;

**WHEREAS**, the Hearing Examiner issued Findings of Fact, Conclusions of Law and Recommendation to City Council on January 5, 2026 (the Hearing Examiner Recommendation), which is attached hereto as Exhibit A and incorporated herein by this reference;

**WHEREAS**, on January 26, 2026, after due notice was provided to the parties of record, the City Council held a consolidated closed record SEPA administrative appeal and closed record determination of the underlying permit applications for the Project;

**WHEREAS**, City Council considered the subject Project proposal, the Hearing Examiner Recommendation, the official record established before the Hearing Examiner, and oral argument related thereto;

**WHEREAS**, the City Council finds the SEPA MDNS appeal should be denied;

**WHEREAS**, the City Council finds the proposed Project to promote the public good and not to be detrimental to the public health, safety, and general welfare;

**WHEREAS**, the City Council finds the proposed Project consistent with the relevant goals and policies of the City of Blaine Comprehensive Plan; and

**WHEREAS**, the City Council finds the proposed Project to be consistent with the Planned Unit Development and Preliminary Plat approval criteria contained in the Blaine Municipal Code.

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BLAINE DOES ORDAIN AS FOLLOWS:**

**SECTION 1: Findings of Fact and Conclusions of Law.** The City Council adopts the above recitals and the findings of fact and conclusions of law contained in the Hearing Examiner Recommendation in their entirety, as the findings of fact and conclusions of law in support of this Ordinance. Collectively, such findings of fact and conclusions of law constitute the findings of Council pursuant to BMC 17.60.140-150.

**SECTION 2: SEPA Appeal.** The City Council denies the Avista at Birch Point SEPA appeal.

**SECTION 3: PUD and Preliminary Plat.** The City Council approves, subject to the conditions set forth in the Hearing Examiner Recommendation, the Avista at Birch Point Planned Unit Development and Preliminary Plat, a 181-acre planned unit development subdivision proposed to contain up to 490 residential units developed in multiple phases with the Phase I preliminary plat comprising 79 lots and 1.9 acres of neighborhood retail development.

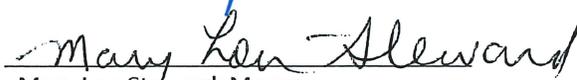
**SECTION 4: Conditions.** These determinations and approvals are subject to the conditions set forth in Exhibit A (Hearing Examiner Recommendation) which is incorporated into this Ordinance by reference.

**SECTION 5: Severability.** If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this Ordinance.

**SECTION 6: Effective Date, Final Decision.** This Ordinance shall take effect and be enforced upon its passage by the City Council and approval by the Mayor, if approved; otherwise, as provided by law and five (5) days after the date of publication. This Ordinance is the final decision by the City Council on the above referenced appeal and applications pursuant to 36.70.C, RCW.

ADOPTED BY THE CITY COUNCIL OF THE CITY OF BLAINE,

WASHINGTON, at a regular meeting thereof held the 26th day of January, 2026.

  
Mary Lou Steward, Mayor

Approved as to form:



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Peter Ruffatto, City Attorney

Attest:



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Sam Crawford, City Clerk



1 **BEFORE THE HEARING EXAMINER FOR THE CITY OF BLAINE**

2 Phil Olbrechts, Hearing Examiner

3

<p>4 RE: Avista at Birch Point</p> <p>5 Planned Unit Development</p> <p>6 and Preliminary Plat</p> <p>7 Permit No.: 2024025 and</p>	<p><b>FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION TO CITY COUNCIL</b></p>
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9 **SUMMARY**

10 Semiahmoo Highlands, LLC has applied for planned unit development (PUD) for the  
11 development of 181 acres into up to 490 residential units along with some minor  
12 commercial development and other associated uses. The PUD proposes five phases of  
13 development over the 181-acre project site. Consolidated with the PUD application is  
14 a preliminary plat application for Phase 1 of the PUD. The Phase I preliminary plat  
15 takes up 33.51 acres and proposes 79 lots and 1.9 acres of neighborhood retail  
16 development. The public hearing on the permit applications included an appeal of the  
17 project’s SEPA MDNS<sup>1</sup> by Otto Pointer (alias) and the Blaine Water Commission. The  
18 project site is located on the west side of Semiahmoo Parkway bounded on the south  
19 and west by the Blaine City Limits. It is recommended that the City Council approve  
20 the permit applications and deny the SEPA appeal.

21 This summary provides a six-page overview of the major issues addressed during the  
22 Avista public hearing. For those wishing to focus upon the impacts of the project,  
23 attention is directed to Finding of Fact (FOF) No. 6 and 7 below, which address adverse  
24 impacts and infrastructure needs respectively at pages 13-32. An explanation of the  
25 legal limits to the City’s stormwater regulations is addressed in Conclusion of Law  
(COL) No. 9 at Page 40. An explanation of why this review likely couldn’t address  
aquifer issues is outlined in COL No. 3 at page 33.

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<sup>1</sup> A SEPA MDNS is a State Environmental Policy Act Mitigated Determination of Non-significance. Such a finding is a determination by the City’s planning director that the proposal will not create any probable significant adverse impacts and thus no environmental impact statement needs to be prepared for the project.

1 The hearing on the project applications was spread over five days and was watched on  
2 zoom for most of that time by 19-25 people. The proposal likely drew considerable  
3 community interest because of historical flooding problems surrounding the project  
site. The SEPA appellants also had concerns about potential impacts to what they  
believe to be a critical aquifer recharge area (CARA).

4 The SEPA Appellants, most notably Mr. Pointer, exerted a monumental effort in  
5 representing the concerns of the surrounding community. They had to absorb  
6 thousands of pages of technical information within the compressed timeframes of the  
7 appeal review process. Despite these efforts, they could not overcome the near bullet-  
8 proof permit record compiled by City planning staff and the Applicant. The City hired  
9 independent experts to peer review the Applicant's stormwater, traffic and wetlands  
10 analysis. The City has also adopted the most effective and stringent stormwater  
standards available to it as prepared and refined by the Washington State Department  
11 of Ecology (DOE). DOE adopted and has repeatedly updated those standards with the  
12 latest stormwater technology since 1992. Short of hiring engineering consultants to  
13 somehow improve upon the 1108-page DOE Stormwater Manual, the City cannot do  
14 much more to make its stormwater regulations more effective.

15 The 2019 edition of the DOE Stormwater Manual was used for the project. The SEPA  
16 Appellants claim that the more recently issued 2024 Manual should have been applied.  
17 As identified in COL No. 9 below, the City could not legally require the 2024 edition  
18 because of a preliminary plat vested rights (grandfathering) statute. The SEPA  
19 Appellants have also not identified any flow control improvements that the 2024  
20 edition would make over the 2019 version. The Applicant's civil engineer testified  
21 that as to flow rates, there is no difference.

22 Of course, for the surrounding community the most important consideration is not how  
23 good the City's regulations or staff may be. Rather what's important is whether the  
24 proposed development will adversely affect their lives, most pertinent as to stormwater  
25 and aquifer impacts. Mr. Pointer unquestionably established that flooding is a current  
problem in the area and that future development may make it worse. The detailed  
hydrological modelling conducted by the Applicant almost as unquestionably shows  
that the project won't make the flooding any worse. The detention facilities proposed  
by the Applicant were demonstrated to reduce off-site peak flows from current  
conditions. Flooding may very well become more severe in the future in the  
surrounding area, but that likely won't be because of Avista.

1 The one shortcoming in the Applicant’s modelling is that it’s based upon precipitation  
2 data from 1948-2009. As testified by Mr. Pointer without substantiation<sup>2</sup>, climate  
3 change may be increasing the frequency and severity of storm events since 16 years  
4 ago. DOE has not approved any computer modelling that integrates more recent  
5 precipitation data. Mr. Pointer did not present any evidence that the estimated increases  
6 in storm events would render the DOE required modelling ineffective. The Applicant’s  
7 modelling established that its stormwater facilities could convey up to 100-year storm  
8 events based upon the 1948-2009 data. Even if Mr. Pointer had been able to show that  
9 climate change has rendered this mitigation ineffective, the City is arguably<sup>3</sup> legally  
10 bound to limit stormwater mitigation to the standards it has adopted. In practical terms,  
11 as previously noted, it would be difficult for the City to have adopted anything more  
12 effective.

13 The Appellants had no qualified expert to contest the engineering work of the  
14 Applicant’s civil engineer. The centerpiece of the Appellants’ challenge to the  
15 Applicant’s stormwater design was modeling results from 2011 (14 years before  
16 Avista) that show maximum allowed flow rates exceeding predevelopment levels by  
17 809%. The problem with these flow rates is they aren’t the flow rates generated by the  
18 proposal. They’re the flow rates modelled in a study prepared by Whatcom County in  
19 2011 to show future flow conditions into Roger’s Slough stormwater facilities. The  
20 Applicant’s stormwater report included the 2011 study to provide background  
21 information on the condition of off-site stormwater facilities (hence its placement in  
22 Appendix B of the Applicant’s report, labelled “Background Documents”). The  
23 modelling prepared for Avista, in contrast, addressed stormwater flows generated by  
24 the Avista development, not the entire basin feedings Roger’s Slough. The Avista  
25 analysis established that off-site flows generated by the Avista wouldn’t exceed the  
forested, predeveloped condition of the Avista project site. The stormwater facilities  
of the Rogers Slough may very well still far exceed predeveloped flow conditions of  
the basin feeding into it, but Avista won’t be contributing to that exceedance.

The one weak point in the City’s review was its CARA review. As authorized by its  
code, the City issued a CAO determination without public comment. That  
determination, a separate permit decision<sup>4</sup>, found that the proposal conformed to the

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<sup>2</sup> Mr. Pointer did try to admit some evidence from the University of Washington that forecast increases  
in storm events. Unfortunately, he hadn’t included that evidence in his exhibit list that was required to  
be filed prior to the hearing. As such, that evidence was not admitted.

<sup>3</sup> SEPA is commonly referred to as a “gap filler” that is intended to fill in gaps in regulations, i.e. address  
issues not anticipated in regulations. Whether the impacts of climate change could qualify as an  
extraordinary circumstance that would merit additional mitigation is debatable. The Examiner isn’t  
aware of any jurisdiction that has as yet attempted to impose more than required by its stormwater  
standards through SEPA on the sole basis of climate change.

<sup>4</sup> Local jurisdictions differ as to whether to allow CAO review to be done separately from discretionary  
permit review. Jurisdictions like Blaine and Mason County authorize separate review. See BMC

1 City's CAO standards. Those standards regulate environmentally sensitive areas such  
2 as CARAs and wetlands. Under current case law, that determination cannot be  
3 challenged in this project review because it wasn't appealed. An appellate court  
4 decision has specifically held that even if a decision is issued without public notice, it  
5 can't be challenged except through a timely appeal. See COL No. 3 at page 33 below.

6 Although legally it's unlikely that the CARA and wetland issues could be addressed in  
7 this proceeding, the evidence on both issues was presented during the hearing without  
8 objection by the City and Applicant on that basis. The record supports the City's  
9 wetland and CARA determinations, but only marginally so on the CARA issue<sup>5</sup>. The  
10 City's evaluation of the presence of a CARA appears to have been solely based upon a  
11 finding that the City's CARA map didn't include the Avista site as within a CARA.  
12 City code makes clear that the City's CARA and wetland maps only serve as a "*source  
13 of generalized information*" and do not conclusively determine the presence of critical  
14 areas. BMC 17.82.060E.

15 Contrary to the City's CARA map, the County's CARA map shows the Avista site  
16 within a CARA area of high risk of aquifer susceptibility. This conflict in CAO maps  
17 should have prompted the City to do further investigation to at least assess the  
18 comparative accuracy of the maps. No such testimony was presented by the City.  
19 However, the Applicant's geotechnical report and some somewhat speculative  
20 testimony from its civil engineer suggested that a CARA was not present. The  
21 Appellants provided no evidence to the contrary other than to assert defects in the  
22 studies supporting the City map. Mr. Pointer asserted that the County map studies  
23 were more site specific. He didn't present the studies for either map into evidence. Mr.  
24 Pointer has no expertise in aquifer or geotechnical issues. Given the SEPA requirement  
25 that substantial weight must be given to the findings of the SEPA official issuing the  
MDNS, the record supports the City's determination that there is no CARA at the  
project site.

The wetland issue was much more easily resolved. The Applicant's wetland  
classifications and delineations were verified in a separate peer review by the City. The  
peer reviewer conducted his own site visit and did a document review as he found

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17.82.070; Mason County Code 8.52.190c. Other jurisdictions require CAO review to be consolidated  
with discretionary permit review, which in effect enables the public to comment on CAO compliance.  
See, e.g. Auburn City Code 16.10.070D("To the extent possible, the city shall consolidate and integrate  
the review and processing of critical area-related aspects of proposals with other land use and  
environmental considerations and approvals.");

<sup>5</sup> The Applicant's civil engineer testified that the project already implements what could be required if  
the proposal was located over a CARA. Specifically, the CC&Rs of the project prohibit pesticides,  
stormwater controls don't include infiltration and the detention pond is lined to prevent infiltration. Tr.  
68. If the Applicant believes they meet CARA requirements even for high risk aquifers, they could  
volunteer a condition requiring to compliance to CARA standards.

1 necessary to assess the Applicant's wetlands report. The Appellants had a well  
2 qualified wetlands expert as well, Oliver Grah. Mr. Grah volunteered (presumably) a  
3 substantial amount of his time to assist BWC. Mr. Grah has a master's degree in water  
science and has served as a senior planner, supervisor and natural resources manager  
for Whatcom County.

4 Mr. Grah testified that he found that Wetland C should be classified as a Type II  
5 wetland instead of a Type III wetland as designated by the Applicant. He also testified  
6 that its buffer should be 225 feet instead of 75 feet. Tr. 446-447. However, Mr. Grah  
7 didn't provide the code basis for this determination in his testimony. He also didn't  
8 provide a report substantiating his findings. Mr. Pointer's closing and reply briefs  
9 provided the code basis for purportedly justifying a larger buffer. Those citations were  
10 to the wrong type of wetlands. Mr. Pointer's briefs asserted that the Wetland C buffer  
11 was incorrectly calculated because the Applicant failed to account for polluted waters  
being both discharged into Wetland C and out of Wetland C. The City's wetland  
regulations only make those factors applicable to depressional and flats wetlands. It is  
uncontested that Wetland C is a slope wetland. The City's wetland regulations don't  
recognize polluted waters as a factor supporting a larger buffer for slope wetlands such  
as Wetland C.

12 Mr. Pointer's closing brief also noted that disturbed soil conditions rendered the  
13 wetland identification methodology used by the Applicant ineffective. The City's  
14 wetland regulations have a specialized methodology for identifying wetlands in  
15 disturbed soil situations. The Applicant's wetlands expert found the site was stable  
16 enough to not necessitate the added methodology. It had been more than 20 years since  
17 the soils had been disturbed. The Applicant's opinion on this issue was based upon site  
18 visits, soil borings and research of the historical disturbance of project site soils. The  
19 independent biologist who did the peer review also didn't cite disturbed soils as a  
20 problem in his report. Other than referencing DOE comments that stated arials may  
show the presence of additional wetlands, Mr. Grah provided no evidence as to why he  
believed the site to be sufficiently disturbed to necessitate the additional methodology.  
Given the relatively sparse evidence relied upon by Mr. Grah, the Applicant's  
delineation and classifications are found to be sufficient using the standard wetland  
indicators of the City's wetland regulations.

21 The Appellants also cited to comment letters provided by DOE and the Army Corps  
22 that suggested that the City may have overlooked some protected waters. DOE's letter  
23 identified the documents it reviewed. Those documents didn't include the City's peer  
24 review report. The DOE letter noted that the number of test pits (a requirement for  
25 wetland delineation) were minimal and that "*[s]aturation [of soils] viewed from aerial  
images can be an indicator of wetland hydrology.*" DOE recommended further  
investigation and offered to review the site itself. Apparently unbeknownst to DOE,  
the City had already implemented DOE's recommendation by its peer review. The

1 City's peer reviewer, another qualified biologist, had conducted his own site visit and  
2 done his own review of pertinent documents. Given the peer review, the site visits by  
3 both Applicant biologist and peer review biologist and the extensive evaluation  
4 conducted by both biologists, this recommendation determines that DOE's concerns  
5 were adequately addressed and that the wetlands were properly delineated.

6 The Army Corps letter identified that some proposed filling of ditches may violate the  
7 federal Clean Water Act because those ditches could qualify as waters of the United  
8 States. Direct violations of federal law are beyond the scope of this permit review.  
9 However, the Army Corps concerns raise the issue of whether the ditches may qualify  
10 as streams protected by the City's critical areas ordinance (CAO). The CAO exempts  
11 artificial water courses as qualifying as protected streams. The Applicant's biologist  
12 and the City's peer reviewer both expressly determined that the ditches qualify as  
13 artificial water courses.

14 The proposal generated about 24 public comments. April Hashimoto, on behalf of the  
15 Semiahmoo Homeowner's Association, wrote a particularly good and comprehensive  
16 outline of neighborhood concerns<sup>6</sup>. See Ex. 36. Other than traffic, the public  
17 comments largely tracked the concerns raised in the SEPA appeal. For traffic the City  
18 has adopted level of service (LOS) standards that set allowed levels of congestion.  
19 Public works standards set the standards for frontage improvements and pedestrian  
20 facilities. The City's public works staff and third party traffic review for LOS found  
21 compliance with City standards on those transportation issues.

22 Some public commentators didn't feel adequate steps were taken for public  
23 engagement. Staff outlined how notice and participation requirements were met in the  
24 staff report. Comments were made about impacts to wildlife. City staff and the  
25 Applicant's biologist found no protected species at the project site. See Ex. C18, p. 2.  
Some people also found the proposed densities to be inappropriate for the area. State  
law, specifically RCW 36.70B.030(3), prohibits the reconsideration of densities  
authorized by the City's zoning code. The density of the project cannot be challenged  
so long as it is consistent with that authorized by the zoning code. Comments were  
also made that more area-wide planning should be involved for transportation

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<sup>6</sup> In her letter Ms. Hashimoto asserts that the City has been delegated authority by the Department of Ecology to administer a comprehensive stormwater study as a condition of approval of the Avista project. Her references to a "stormwater study" don't directly correspond to any BMC requirement or state statute. It appears she may have been referring to the obligations of some cities and counties in Washington State under the Clean Water Act to implement some waterbody specific Clean Water Act protection measures. As identified in COL 3, Whatcom County is subject to those requirements while Blaine is not. Despite the inapplicability of this Clean Water Act requirement (specifically National Pollutant Discharge Elimination System permit conditions), the City has volunteered to assume the most pertinent and effective requirement of the Clean Water Act for this project review, i.e. the Department of Ecology Stormwater Management Manual for Western Washington.

1 improvements. The City already conducts city-wide transportation planning in the  
2 transportation element of its comprehensive plan and its six year street improvement  
3 plan.

### 4 **ORAL TESTIMONY**

5 A computer-generated transcript of the hearing has been prepared to provide an  
6 overview of the hearing testimony. The transcript is provided for informational  
7 purposes only as Appendix A. The transcript is not intended to provide a precisely  
8 accurate rendition of testimony by generally identifies the subjects addressed during  
9 the hearing. Appendix A page citations are referenced in this recommendation as “Tr.  
10 X.”

### 11 **EXHIBITS**

12 Admitted are listed from each of the parties as follows:

#### 13 ***City Exhibits (Prefix “C”):***

14 Exhibits C1-C232 of the City’s PUD/Plat Exhibits list as of November 5, 2025 were  
15 admitted during the first day of hearing on November 5, 2025 along with the following  
16 seven public comment letters:

17	C233.	11/4/25	Hashimoto
18	C234.	11/3/25	Cohenour
19	C235.	11/3/25	Pentland
20	C236.	11/4/25	Keats and Garland
21	C237.	11/4/25	Alpisa
22	C238.	11/4/25	Kulman
23	C239.	11/4/25	Steel

#### 24 ***Applicant’s Exhibits (Prefix “S”)***

25 The seven exhibits listed in the Applicant’s October 10, 2025 exhibit list were admitted  
into the record without objection during the hearing.

#### ***Appellant Exhibits (Prefix “A”, Webpage Exhibits Prefix “W”) :***

A4 Birch Bay Watersheds Characterization and Planning Study 2007  
A5 Birch Point Subwatershed Drainage Study Report.  
A7 BLA 460 Geotech Report  
A22 HE Decision Inverness Appendix A  
A68 2025.10.03 - Aamot - 2025 Update - Email to Blaine  
A83 Doralee Booth Photographs of November 21 storm



1 The rebuttal lists were due October 26, 2025. The Appellants emailed the Examiner on  
2 2:03pm on October 27, 2025 requesting an extension to 5 pm that day since October  
3 26, 2025 was a Sunday. The Appellants then submitted their rebuttal list at 4:52 on  
4 October 27, 2025. The Examiner responded “*late admission accepted*” by email 6:47  
5 pm, October 27, 2025. The Appellants then submitted a different rebuttal list later that  
6 evening with more exhibits by email at 10:02 pm. At hearing the Examiner identified  
7 that the 10:02 pm list would be used as the numbering for the Appellants’ exhibits. Tr.  
8 241. The Appellants then proceeded to use a different numbering order throughout the  
9 rest of the proceeding from an unknown source.

10 The Appellants’ rebuttal list presented a problem to the other parties. Since those  
11 exhibits were presented for the first time the other parties had no opportunity to provide  
12 prehearing rebuttal exhibits. More important, the relevancy of the exhibits was not  
13 apparent. For these reasons, the City and Applicant were unwilling to have the exhibits  
14 admitted all at once. Given the adversarial nature of the proceeding and the Appellants’  
15 lack of expertise in evidence, it was evident that the average time used to debate each  
16 exhibit could easily reach ten minutes, thus taking more than an entire day to get  
17 through the Appellants’ 84 exhibits.

18 In circumstances where there are lengthy exhibit lists and the parties aren’t willing to  
19 stipulate to wholesale admission, its common to have the parties present their exhibits  
20 during their presentations as the exhibits become relevant to their case. The remaining  
21 exhibits are then addressed individually at the end of the party’s presentation of its case.  
22 The City and Applicant objected to this procedure on the basis that the Appellants  
23 should have presented the exhibits in their opening exhibit list rather than a rebuttal  
24 list. However, given that the City had presented its record well before the opening lists  
25 were due, it was partially understandable that the Appellants would believe they were  
presenting rebuttal exhibits. Consequently, the Appellants were given a second  
opportunity to present their exhibits by presenting them individually as part of their  
case in chief.

In their second opportunity to admit their exhibits, the Appellants only presented five  
of their 82 exhibit list documents in the course of their presentations of evidence with  
one additional document that wasn’t in the list. As previously noted, when exhibit list  
exhibits are required to be presented individually in the course of a party’s presentation,  
the remaining exhibits that weren’t presented are offered up at the end of the  
presentation. In this case the Appellants still had 77 exhibits remaining. This didn’t  
resolve the original problem of too many exhibits to debate all at once. Consequently,  
the Examiner offered and the Appellants agreed to present their exhibits as citations in  
their closing brief as a third opportunity to admit their exhibits. This would provide an  
efficient way to establish relevancy. The City and Applicant were of course given the  
opportunity to provide new rebuttal evidence if necessary in response to any admitted  
documents, since they weren’t given that opportunity to provide rebuttal lists before as

1 part of the prehearing exhibit exchange process. This new process created the risk of  
2 having to reopen the hearing if cross examination or the like became necessary. That  
3 risk was found worth taking given the alternative of taking an entire day debating  
4 admissibility.

5 Another problem with the Appellants exhibits was that some of them were just links to  
6 website that contained hundreds of pages of webpages and/or linked documents. To  
7 address the webpage links identified as exhibits, the Appellants were allowed to remedy  
8 that error by saving the documents and/or webpages from the links they wished to  
9 present as evidence as pdfs. For documents generated at the website by entering data  
10 inputs, the Appellants were directed to print out the resulting documents as pdfs and  
11 identify the inputs used to generate the documents. These web-based documents were  
12 due November 7, 2025. The Appellants didn't produce the requested pdfs. The  
13 Examiner, the City and the Applicant all instead received an email on November 7 with  
14 no pdfs attached, exhibits that weren't in the Appellants' rebuttal list and links to  
15 webpages that had maps of the entire state of Washington or the entire United States.  
16 Tr. 236. By a November 10, 2025 Examiner email, the Appellants were given a second  
17 opportunity to present their web-linked documents by citing to pdf generated versions  
18 in their closing briefs.

19 Despite the third opportunity to present their exhibits and weblinked exhibits for  
20 admission in their closing brief and their second opportunity to admit web-based  
21 documents, the Appellants made no admissible reference to their rebuttal list in their  
22 closing argument. Although the Appellants didn't cite to their rebuttal list in their  
23 closing brief, they did submit 14 separate exhibits concurrently with the closing brief  
24 that weren't cited in the closing brief. The Appellants were thus given a fourth  
25 opportunity to present their rebuttal list exhibits for admission by citing to the exhibits  
in their reply briefs so long as the exhibits were limited to reply argument and listed in  
their rebuttal exhibit list. The Appellants were also authorized to alternatively present  
for admission the exhibits they provided concurrently with their closing brief with a 25  
word or less explanation as to relevancy for each document. The concurrently  
presented exhibits were only admissible so long as they were listed in the Appellants  
rebuttal list.

In their reply brief and accompanying relevancy explanation the Appellants didn't  
present any exhibits identified in their rebuttal exhibit list. Instead they presented an  
entirely new set of exhibits . The City and Applicant raised no new evidence in their  
closing brief so there was no basis to introduce new evidence that wasn't included in  
the Appellants' rebuttal list. No new exhibits were admitted from the reply briefing  
and associated relevancy explanations as a result.

**Substantive:**

1 4. Proposal/Site Description. Semiahmoo Highlands, LLC has applied for  
2 planned unit development (PUD) for the development of 181 acres into up to 490  
3 residential units along with some minor commercial development and other associated  
4 uses. The PUD proposes five phases of development over the 181-acre project site.  
5 Consolidated with the PUD application is a preliminary plat application for Phase 1 of  
6 the PUD. The Phase I preliminary plat takes up 33.51 acres and proposes 79 lots and  
7 1.9 acres of neighborhood retail development. The public hearing on the permit  
8 applications included an appeal of the project's SEPA MDNS by Otto Pointer (alias)  
9 and the Blaine Water Commission. The project site is located on the west side of  
10 Semiahmoo Parkway bounded on the south and west by the Blaine City Limits.

11 The Avista project is a phased residential development with neighborhood commercial  
12 and supporting community services, including self-storage, aging-in-place, and HOA  
13 maintenance and storage facilities. The project has been designed with a mix of  
14 residential unit types, large open space tracts with an extensive trail system, and  
15 significantly increased buffers to Semiahmoo Parkway. The application materials  
16 include a preliminary plat for Phase One, described below, and a Planned Unit  
17 Development (PUD) application with design concepts that include unit clustering, open  
18 space connectivity, and the preservation of wetlands.

19 The PUD process is a two-step decision process. The initial application requires City  
20 Council approval following a public hearing and recommendation from the City  
21 Hearing Examiner, and then a final PUD Master Plan approval within 180-Days of a  
22 City decision<sup>1</sup>. The initial PUD Master plan includes the basic design elements along  
23 with additional detail as necessary to clearly convey the intent of the developer. The  
24 final PUD Master Plan shall include all requirements of the approval of the City,  
25 including any such recommendations from the Hearing Examiner, as adopted by City  
Council. The master plan shall incorporate the conditions of project approval and the  
contents of the CC&Rs, and the master plan becomes the guiding document for  
development of the overall site, individual phases, building sites and structures, and  
public and private open space.

This two-step PUD process is vital for considering the Avista Project, where greater  
detail is provided for Phase 1, which includes a preliminary plat application, and less  
detail is provided for future phases but clearly conveys the intent of the developer. Once  
a decision is made on the initial applications, and specific land uses and building types  
are authorized, the Applicant then updates the master plan with final details.

The Avista site is composed of seven contiguous parcels on the south side of  
Semiahmoo Parkway. The Blaine City limits bound portions of the west and south  
boundaries.



Phase one of the Avista PUD is the 33.51-acre Sunrise Division, which includes 79 detached single-family lots and 6.72 acres of open space including 3.15-acre private Avista community Nexus Park. The primary Avista Project entry off Semiahmoo Parkway will create an intersection with the Semiahmoo Resort Golf Course entrance that will lead residents and visitors past the Neighborhood Center to Nexus Park, a broad, open field set against the 9.07-acre Osoberry Forest backdrop in the center of the Avista Project. A second emergency access route will be constructed for Phase 1.

The PUD establishes the five project phases, open space tracts and the Phase One Sunrise Division. See Avista Preliminary Plat for fine details, Ex. C7. The Avista Preliminary Plat for Phase One includes all required elements for the Sunrise Division, but does not depict lot configurations, commercial parcels, stormwater facilities, delineated critical areas, open space, park tracts or parcel configurations proposed for the future PUD phases.

4. SEPA and Appeals. The City issued a SEPA determination of Mitigated Non-significance (MDNS) on June 25, 2025. Two appeals to the MDNS were filed on July 9, 2025<sup>7</sup>. One appeal was filed by Whatcom County. The other was jointly filed by Otto Pointer<sup>8</sup> and the Blaine Water Coalition.

<sup>7</sup> Whatcom County in fact didn't file its appeal fee on July 9, 2025. The appeal fee was submitted the next morning. The City moved to dismiss that appeal on that basis. That motion was denied.

<sup>8</sup> Otto Pointer is an alias. The City and Applicant filed motions for dismissal for lack of standing on July 8, 2025 and July 15, 2025. As to Mr. Pointer, the standing arguments were limited to the fact that Mr. Pointer was using an alias. The motions as they pertained to alias were denied in a September 4, 2025

1 The City and Whatcom County resolved their SEPA issues with a mitigation  
2 agreement. The County filed a motion to withdraw their appeal on October 22, 2025.  
3 That motion was granted by order issued November 4, 2025.

4 Section IV of the BWC appeal entitled “Statement of Issues Presented,” alleged a  
5 failure to assess required cumulative impacts and to properly assess impacts to water  
6 quality, flooding and critical aquifer areas. Section V “Grounds for Appeal” added  
7 failure to properly set wetland buffers.

8 5. Surrounding Area. Much of the land to the north, east, and south of the  
9 Avista site has been or is proposed for development with single-family and multi-unit  
10 residential subdivisions. The Semiahmoo Resort and Golf Course and its surrounding  
11 neighborhoods is on the opposite side of Semiahmoo Parkway. Two abutting  
12 unincorporated Whatcom County properties to the west of the Avista site are under the  
13 same ownership (Ocean View Farms LLC) as the Avista Project parcels.

14 Unincorporated Whatcom County adjoins the Avista project to the south. At this  
15 location the 171-lot Birch Bay View subdivision is fully built out with single-family  
16 residences. A 40-acre parcel west of Birch Bay View is owned by Ocean View Farms  
17 LLC (Avista property owner), and the Avista application materials reference this  
18 property as a possible future expansion. To the south and southeast, the Horizon at  
19 Semiahmoo subdivision is under construction.

20 6. Adverse Impacts. As conditioned, the proposal is not found to create  
21 significant impacts. Pertinent potential impacts are more specifically addressed as  
22 follows:

- 23 A. Section 303d Waters. The SEPA Appellants have not established any  
24 adverse impacts to Clean Water Act Section 303d waters (waters identified  
25 as impaired or threatened due to water quality issues). As outlined in FOF  
7A, the City’s stormwater standards already impose comprehensive water  
quality standards that integrate all known, available, and reasonable  
methods of water quality treatment. The Appellants have not identified any  
pollutants that would bypass this treatment to further jeopardize the  
impaired condition of these waters.

At the outset, it should be recognized that the Examiner likely has no  
jurisdiction to directly address Clean Water Act violations in this permit  
review. The Clean Water Act is a federal statute. The Examiner’s

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Order with the condition that Mr. Pointer took some specified measures that made him accountable for  
his participation.

1 jurisdiction is limited to applying City adopted standards. However,  
2 Section 303d designations do reveal impaired water conditions that can be  
3 exacerbated by a development project. Such impacts are arguably within  
4 the ambit of SEPA review. The contrary argument would be that impacts  
5 are adequately mitigated by enforcement of the Clean Water Act with the  
6 agencies empowered to do so. In any event, the Appellants have presented  
7 no evidence that the proposal would exacerbate the poor water quality of  
8 any impaired water body. The SEPA responsible official determined that  
9 no added water quality protection measures are necessary beyond those  
10 imposed by the City's stormwater regulations. That determination is due  
11 substantial weight.

12  
13 B. Aquifer. As determined in COL No. 3, the Examiner has no jurisdiction to  
14 address aquifer compliance issues with the City's Critical Areas Ordinance.  
15 However, the parties did not object to evidence presented on aquifers on  
16 that basis. To prevent a remand on this issue should a court find CAO  
17 compliance still subject to review, findings on the aquifer are provided  
18 below

19  
20 The weakest point of the City's defense is its CARA determination. The  
21 City's closing brief asserts that the City's CAO "*requires a detailed study*  
22 *only where a proposal is within a City designated aquifer recharge area.*"  
23 City Closing Brief, p. 10. That is certainly correct. However, the record is  
24 far from clear that the project area is not in a designated aquifer recharge  
25 area. BMC 17.82.490D provides that designated aquifer recharge areas  
include areas overlying unprotected aquifers used as a source of potable  
water.

It is uncontested that Whatcom County critical area maps show the project  
site encumbered with a Critical Aquifer Recharge Area while the maps of  
the City do not. BMC 17.82.060E provides that "*critical area maps shall*  
*be utilized as a source of generalized information and shall not be used to*  
*determine the absolute presence, absence, or boundaries of a critical area*  
*or as substitute for site-specific assessment.*"

The critical area maps of both the City and County do not appear to have  
been specifically adopted by ordinance or resolution. As such judicial  
notice cannot be taken of them. The County's CARA map is included in  
Ex. A68, pdf p. 3. It depicts the project area as being mostly encumbered  
with high aquifer susceptibility areas and some moderate susceptibility  
areas in the southeast portion. The City's map does not appear to be in the  
record.

1 The SEPA parties differ as to the accuracy of the CARA maps. Mr. Pointer  
2 in his closing brief, p. 5, asserts that the City's CARA map traces back to a  
3 "1996 Golder report" (not in evidence) that didn't study the Sumas-Blaine  
4 aquifer beneath the project site. The brief further asserts that the County's  
5 map is based on "work" that did evaluate the underlying aquifer and  
6 concluded that it had high susceptibility. Mr. Pointer is not an engineer,  
7 geologist or hydrogeologist. He has no training or expertise to question the  
8 best available science basis of the County or City maps. He provided no  
9 documentation to support his opinions regarding the CARA maps, including  
10 the studies upon which they were based.

11 The Applicant's civil engineer, Craig Parkinson, testified that the County  
12 map is inaccurate. Mr. Parkinson consulted with someone from the County  
13 who told him that the County didn't consider its CARA map to be accurate  
14 and confirmed that the map designated the aquifer as surficial at the project  
15 site. Mr. Parkinson searched well records and only found one well near the  
16 site. The well is just over 200 feet deep with low three gallon per minute  
17 capacity. Mr. Parkinson interpreted this to mean that there's limited  
18 groundwater capacity and it's likely not influenced very heavily from  
19 surface water or surficial groundwater because of an impervious layer. He  
20 noted that the Applicant's geotechnical report found an impermeable layer  
21 at about four foot depth across the project site based upon 14 test pits across  
22 the Avista project site. Tr. 61-62. Mr. Parkinson is a licensed Professional  
23 Engineer with 35 years experience working on land use projects. Ex. S1.

24 Mr. Wenger testified that the City's critical area maps are indicator maps  
25 that provide initial guidance as to the potential presence of critical areas.  
Mr. Wenger did not believe that the contradictory information of the County  
maps served as grounds for additional investigation. Tr. 299.

A more robust defense of the City's CARA map by the City would certainly  
have been merited here. The fact that there's a conflicting county CARA  
map should have put the City on notice that there may be differences of  
qualified opinion on the presence of a CARA. At the least, the City should  
have been able to give a best available science explanation as to why its  
map should be considered more accurate than the County map.

On balance, the City's determination of no regulatory protected CARA is  
supported by substantial and preponderance of evidence when coupled with  
the substantial weight to be given to the findings of the SEPA responsible  
official. Substantial weight must be given to the SEPA Responsible  
Official's determination that the City's CARA map serves as a reliable  
indicator of the presence of a regulatory protected CARA. The presence of

1 impermeable layers at the project site coupled with Mr. Parkinson's  
2 testimony supports the finding that any aquifer present at the site would not  
3 qualify as a regulated aquifer under BMC 17.82.490D, which requires  
4 drinking water aquifers to be unprotected. The only credible countervailing  
5 evidence is the County's CARA map that Mr. Parkinson's hearsay  
6 testimony provides is unreliable.

7  
8 C. Wetlands. As determined in COL No. 3, the Examiner has no jurisdiction  
9 to address compliance issues with the City's Critical Areas Ordinance.  
10 However, the parties did not object to evidence presented on wetlands on  
11 that basis. To prevent a remand on this issue should a court find CAO  
12 compliance still subject to SEPA review, findings on the wetlands are  
13 provided below. The proposal is not found to create any significant adverse  
14 impacts to wetlands because the Applicant's wetland delineations and  
15 classifications conform to the City's critical area regulations.

16 i. ***Applicant Delineation/Classification.*** The Applicant prepared  
17 wetland delineation report that classified and delineated the on-site  
18 wetlands, Ex. C18 and C225. The Applicant's wetland analysis was subject  
19 to peer review by Perteet. Perteet's report agreed with the Applicant's  
20 review and found it to conform to the City's critical area regulations. Ex.  
21 C211.

22 The Applicant's wetland report found four Category III wetlands subject to  
23 75-foot buffers and one Category IV buffer with a 50-foot buffer.

24 ii. ***DOE Comment.*** SEPA Appellants relied heavily upon comments from  
25 DOE that expressed a couple concerns about the Applicant's wetlands  
determination. See Ex. C69. One concern was that it appeared some  
proposed trails were crossing into the wetlands of the site. The other was  
that as DOE believed there may be more wetlands than designated in the  
Applicant's wetland report due to the observance of saturated soil  
conditions in aerial photographs.

The staff report responds that the trails observed by DOE were not depicted  
in the PUD site plan and construction drawings recommended for approval.  
The trail crossings were instead erroneously identified in a civil drawing  
depicting utility infrastructure. To remove any confusion on the issue,  
Condition No. 94 prohibits any proposed wetland trail crossings.

As to the potential presence of additional wetlands, that DOE determination  
was only attributed by DOE to a review of aerial photographs. The DOE  
comments on this issue are due very little weight because they were not

1 present at the hearing for cross examination. The DOE letter also identified  
2 the documentation reviewed for its determination. That documentation  
3 didn't include the peer review by Perteet that confirmed conformance to the  
4 City's wetland standards. DOEs recommendation regarding its concern  
5 over more wetlands was to have further evaluation conducted.

6 Perteet essentially conducted the additional investigation recommended by  
7 DOE with its peer review. The Perteet review is the further evaluation  
8 recommended by DOE. Given (1) that DOE was not present for cross-  
9 examination; (2) that DOEs site observations were limited to aerial  
10 photographs; and (3) that the Applicant's wetland delineation was peer  
11 reviewed as requested by DOE, substantial and preponderance of evidence  
12 establishes the Applicant's wetland delineations as accurate.

13 **iii. Army Corps Comment.** The Army Corps of Engineers also submitted  
14 a comment noting that the drainage ditches proposed to be filled by the  
15 Applicant may qualify as waters of the United States that would require an  
16 Army Corps permit. Perteet's peer review confirmed that Applicant's  
17 wetland report findings that the drainage ditches are artificial watercourse  
18 created out of non-wetland areas as defined by BMC 17.82.540. The Army  
19 Corps letter did not indicate whether the Army Corps had investigated the  
20 history of the ditches to determine whether they were artificial. The Army  
21 Corps was also not present for cross examination at the hearing so its  
22 comments like those of DOE are given little weight.

23 BMC 17.82.100(6) exempts artificial watercourses from critical area  
24 review. Given the peer-reviewed findings that the drainage ditches qualify  
25 as artificial and no evidence to the contrary, the filling of the ditches is found  
exempt from City critical areas review. If Army Corp regulations still  
require an Army Corps permit, that's a federal compliance issue outside the  
scope of this review. This permit review doesn't enforce federal regulations  
except as integrated into state or local law.

**iv. Stormwater Impacts.** The Appellants have correctly identified that the  
proposed drainage system moderately fails to meet stormwater manual  
hydroperiod requirements. A condition of approval requires the  
conveyance system to be redesigned as necessary to conform to the  
hydroperiod requirements.

Appendix C, p. 189 of the Manual requires wetland hydrology shall not be  
increased or decreased by more than 20%. The Manual requires  
hydroperiod modelling for a 365-day period with stormwater volumes  
averaged on a daily basis. P. 189 provides that "[n]o day can exceed 20%

1 *change in volume.”* The modelling conducted in the Applicant’s  
2 stormwater report includes the required modelling with two days exceeding  
the 20% variance for Wetland B. The report concludes as follows:

3 *....The results of the daily Wetland Input Volume Analysis are provided*  
4 *in the WWHM analysis included in Appendix C. These daily values are*  
5 *also within the acceptable DOE Manual tolerance and are identified as*  
6 *“Pass” except for two days (November 2 and 3). These two values, at*  
*124.8 and 127.5, are only slightly greater than the 120.00 threshold*  
*value.*

7 *Based on the variability of the actual site conditions with the model*  
8 *input parameters (i.e., the actual permeability of the in-situ existing and*  
9 *developed site soils v. the model assumed values, the variability in the*  
10 *water consumption and evapotranspiration rates in a mature v.*  
11 *secondary growth forested area and densely v. sparsely vegetated*  
12 *pasture, etc.) the fact that only two days did not meet the threshold*  
*requirement, and then just slightly, does not appear to be significant.*  
*The proposed changes in the developed condition will therefore have an*  
*acceptable Wetland Input Volume response and meets the DOE Manual*  
*criteria for providing Wetland Hydroperiod Protection.*

13 Ex. C21, p. 21.

14 The Manual does not allow for any minor deviation from its 20% variability  
15 cap. The fact that the proposed stormwater controls are operating so close  
16 to the tolerance edge as to sometimes exceed it shows that more work needs  
to be done to bring the controls safely within tolerance levels.

17 Recommended Condition No. 26 of the staff report has been revised by the  
18 City in their closing brief to specifically require conformance to Manual  
hydroperiod standards for all “future preliminary plat applications.”  
19 Condition No. 26 has been further revised by the Examiner to include Phase  
20 I in the requirements for hydroperiod conformance.

21 *v. Buffer – Polluted Waters.* Appellants claim that the buffer for  
22 Wetland C was incorrectly calculated. This was apparently based upon the  
findings of the Appellants’ sole hearing expert, Oliver Grah<sup>9</sup>. The buffer is

23 \_\_\_\_\_  
24 <sup>9</sup> The Appellants’ witness list identifies Mr. Grah as an environmental civil engineer. Mr. Grah  
25 acknowledged at the hearing that he is not a licensed engineer. Tr. 186. However, Mr. Grah has a  
master’s degree in water science and has served as the senior planner, supervisor and natural resources

1 found to be correctly calculated as set by the Applicant's biologist and  
2 confirmed by another biologist in peer review. The Appellants' buffer  
3 argument was incorrectly based upon factors that only apply to depressional  
4 and flats wetlands. Wetland C is a slope wetland.

5 Wetland buffers are set by BMC 17.82.340B. Buffer width for each class  
6 of wetland is set by its habitat function score. Habitat function scores in  
7 turn are set by the most recent edition of the Washington State Department  
8 of Ecology's Washington State Wetlands Rating System for Western  
9 Washington. BMC 17.82.310. In applying BMC 17.82.340B it must be  
10 recognized that that habitat scores set in that section are based upon an older  
11 version of the Rating System. The current, 2014, rating system uses  
12 different values for habitat scores. The DOE website includes a table that  
13 translates the 2004 habitat scores into the 2014 scores.

14 The Applicant's wetland report assigns a habitat function score of 7 to  
15 Wetland C. A habitat function score of 7 is equivalent to a score of 20-28  
16 under the 2004 rating system. The Appellants assert that the score is 9<sup>10</sup>,  
17 which is equivalent to a score of 29-36 under the 2004 rating system. BMC  
18 17.82.340B requires a 75-foot buffer for Class III wetlands under the  
19 Applicant's 20-28 score and a 225-foot buffer for Class III wetlands under  
20 the Appellant 29-36 score.

21 The Appellants assert that the Applicant's 7 score is two points too low  
22 because it fails to add one point for the fact that the wetland is hydrated  
23 from a pollution generating surface, i.e. a golf course and a second point  
24 because the wetland discharges into a Clean Water Act impaired 303d  
25 water.

In their closing brief the Appellants initially erroneously identified these  
two added points as being required by Sections H1.1 and H.1.3 of the  
wetland ratings forms of the Rating System. The Applicant's correctly  
responded that these two sections only add points for plant structure  
community and plant richness. Those factors have nothing to do with  
pollution generating surfaces or polluted receiving waters.

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manager for Whatcom County. His responsibilities focused upon CAO and clearing and grading regulations. He has taught courses in wetland delineation. Tr. 189.

<sup>10</sup> The appellants actually argue the score is 8 because they incorrectly reference the Applicant's score as 6. The 2004 score for 8 or 9 is the same, i.e. 29-36. The Appellants' erroneous reference to the Applicant's habitat management score makes no difference in the resulting buffer requirement.

1 In reply the Appellants then asserted that the two added points are required  
2 by Section D of the rating form. Section D does add two points for the  
3 pollution factors identified by the Appellants. However, as identified on the  
4 form itself and Section 5.2 of the Rating System, Section D only applies to  
5 depressional and flats wetlands. Wetland C is neither. It is a sloped  
6 wetland. The Ratings System does not require two additional habitat  
7 function points for sloped wetlands due to the pollution factors identified  
8 by the Applicant. The Applicant's habitat function score is thus correct as  
9 is the resulting 75-foot buffer.

10  
11 **v. Wetland Data Point – Missing Hydrology.** The Appellants closing brief  
12 also makes a highly illogical claim that an area not found to be a wetland in  
13 the Applicant's wetlands report was erroneous because it didn't find the  
14 hydrology necessary to establish a wetland area. The Applicant's wetland  
15 forms correctly concluded that an area without wetland hydrology does not  
16 qualify as a wetland area.

17  
18 An area qualifies as part of a wetland if it contains three wetland indicators,  
19 specifically (1) wetland vegetation; (2) hydric soils; and (3) wetland  
20 hydrology. See p. 9-10, 1987 Army Corps of Engineer Manual; BMC  
21 17.82.300. The City's wetland regulations include detailed standards for  
22 identifying how areas qualify for these three indicators and forms that must  
23 be filled out to apply these standards. The forms require the evaluator to  
24 check off boxes that correspond to site characteristics that qualify as  
25 wetland hydrology.

The delineation form for test pit SP-64 left the hydrology blanks all blank  
because no hydrology characteristics were present. On this basis, the SP-  
64 area was found not to qualify as wetland. The closing brief concludes  
that "[a] boundary point like SP-64, with no recorded hydrology  
parameter, cannot satisfy the three-parameter requirement." P. 20. Of  
course, that's just the point. If a sample point doesn't have wetland  
hydrology, hydric soils and vegetation, then there's no wetland. That was  
the correct conclusion of the wetland report.

The Appellants based part of their SP-64 argument on the assertion that SP-  
64 was "hydrologically connected" to SP 63. SP-63 does have wetland  
hydrology. That point is identified in the middle of Wetland C in Figure 3  
of the wetland delineation while SP-64 is shown on the upland edge. The  
Appellants haven't done a site visit and there's no information in the record  
that would suggest that the two points are hydrologically connected beyond  
just being close to each other. Perhaps the Appellants believe that all points  
on the boundaries of wetlands have wetland hydrology but fail to qualify as

1 wetlands due to lack of hydric soils or wetland vegetation. If that's the  
2 reason, they didn't supply that information or any evidence to support it.  
3 As presented, the Appellants have not identified any deficiency in the  
4 evaluation of SP-64.

5 *vi. Disturbed Soils.* A final assertion by the Appellants is that the  
6 Applicant failed to take into consideration disturbed soil conditions when  
7 assessing the presence of wetlands. The Applicant correctly found that  
8 disturbed soil methodology was not necessary to classify and delineate the  
9 wetlands of the project site.

10 Recently disturbed soils can eliminate the indicators of wetland hydrology,  
11 hydric soils and/or wetland vegetation necessary to evaluate the presence of  
12 wetlands. Chapter 5 of the Western Supplement to the Wetland Delineation  
13 Manual provides alternative techniques for assessing the presence of  
14 wetland indicators due to soil disturbance.

15 The author of the Applicant's wetland study, William Cantrell, testified that  
16 the project site had been stable for over 20 years and that there was no  
17 difficulty in assessing the presence of wetlands. Tr. 325. The peer  
18 reviewers of the report, who did a site visit, also found no need to resort to  
19 the Chapter 5 procedures for assessing disturbed soils.

20 The Appellants presented no evidence as to why the soils should be  
21 considered disturbed enough to qualify for Chapter 5 assessment  
22 methodology. The only thing Mr. Grah could point to was the DOE  
23 comment that aerial photographs suggested some saturated soil conditions  
24 and acknowledgment by the Applicant's wetland expert that the soils had  
25 been disturbed more than 20 years ago. Mr. Grah presented no aerials  
demonstrating the timeline and extent of disturbance, identified no  
document research of his own addressing what site disturbance had  
occurred, no explanation as to how those site disturbances could mask or  
eliminate wetland indicators and no evidence of potentially more wetland  
other than the DOE comment supporting the position that more wetlands  
could be present. The Applicant's wetlands biologist and the peer reviewer  
both conducted site visits and the Applicant's biologist also did his own  
research on the historical disturbance of the site. The balance of evidence  
was on the side of the Applicant, even without any deference due the  
findings of the SEPA responsible official.

D. Natural Features. Natural features are adequately maintained. The PUD  
preserves the wetland and wetland buffers on the site. The site is partially  
forested, containing stands of mature trees. Perimeter buffers and forested open

1 space will be retained. To retain and protect trees with a high retention value to  
2 the maximum extent possible, Condition 53 requires the Applicant is required to  
3 work with a certified arborist or similarly qualified professional to inventory  
4 significant trees (evergreen or deciduous, six inches in diameter or greater,  
measured four feet above existing grade) within the designated natural open  
space areas and perimeter buffers, assess the health of trees, and provide  
recommendations for management practices.

5 7. Adequacy of Infrastructure and Public Services. The proposal provides for  
6 adequate and appropriate infrastructure as follows:

7 A. Drainage: The proposal provides for adequate and appropriate drainage  
8 facilities because they have been designed in accordance with the City's  
9 stormwater standards by the Applicant's engineer, Mr. Parkinson. Mr.  
10 Parkinson's stormwater report, Ex. 21, provides detailed explanation, data and  
11 computer modeling establishing conformance to the City's stormwater  
regulation. That conformance was verified by the City's on-staff civil engineer  
as well as independently peer reviewed by another engineer from Pacific  
Engineering. Tr. 23, 253, 261.

12 ***i. Background.*** The proposal is vested to the 2019 version of the Department  
13 of Ecology Stormwater Management Manual for Western Washington . The  
14 Manual incorporates stringent water quality control measures as required by the  
15 Washington State Department of Ecology that incorporates all known, available  
16 and reasonable methods of stormwater prevention, control and treatment  
17 (AKART) that applied at the time the manual was released in 2019. *See* RCW  
90.52.040 and RCW 90.48.010. Those standards include requiring that off-site  
flows generated by the proposal do not exceed forested predeveloped conditions  
of the project site. They also include stringent requirements designed to protect  
water quality.

18 The flow controls proposed by the Applicant include a road catch basin and  
19 conveyance system that will convey the collected runoff to a combined  
20 stormwater treatment wetland and detention pond located in the southeast  
21 corner of the project site (Tract E). Computer modelling was used to estimate  
22 off-site flow rates generated by the proposed development. The stormwater  
report, prepared by a civil engineer, concluded as follows:

23 *The proposed project's stormwater management will meet the*  
24 *current DOE Manual requirements, which includes detaining the*  
25 *developed site's runoff to a forested condition. The detained runoff*  
*flow rate at a forest condition rate is anticipated to be less than the*  
*current flow rate due to extensive areas currently used as*

1 *pasture/hay fields. This detained runoff is therefore anticipated to*  
2 *have a negligible effect on the downstream stormwater conveyance*  
3 *system.*

4 Ex. 19, p. 5-6.

5 **ii. 809% Exceedance.** Appellants identify data points from the computer  
6 modelling of the Applicant's Ex. C21 stormwater report that they claim to  
7 violate flow rate standards. Most notably, the Appellants open their closing  
8 brief argument by identifying data points that shows flows exceeding  
9 predeveloped flow rates by 809% and 4,551%. The data used by the Appellants  
10 doesn't apply to Avista flow rates. The data is background information used to  
11 show the flow rates from future development conditions of the entire basin  
12 flowing into Roger's Slough stormwater facilities.

13 The flow data used by the Appellants was taken from Appendix B of the  
14 Applicant's stormwater report. Appendix B is entitled "Background  
15 Documents." One of the three studies included in Appendix B contains the flow  
16 rates cited by the Appellants, specifically a 2011 report entitled Roger's Slough  
17 Preliminary Design Concepts. That report assesses the impact of future  
18 development of the drainage basin that contributes stormwater to Roger's  
19 Slough stormwater facilities. The report identifies a flood control gate that  
20 serves as the major flood control facility of the basin. The report uses the  
21 modelling referenced by the Appellants to estimate how the gate will function  
22 under future development conditions. The report found that the gate currently  
23 functions within capacity but that this capacity will be exceeded in the future  
24 due to flow exceedances such as the 809% and 4,551% referenced by the SEPA  
25 Appellants.

Drainage from the Avista site will ultimately pass through the Roger's Slough  
facilities. However, the proposal won't be increasing the flow rates through  
those facilities. As previously noted, flow rates are likely to be less as a result  
of the flow controls included in the proposal. As a result, the proposal will  
actually likely help prevent the exceedances estimated in the background  
document from occurring. As a matter of constitutional law, a development  
project can only be required to proportionately mitigate impacts that it creates.  
*See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97  
L.Ed.2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129  
L.Ed.2d 304 (1994). In this case, the proposal will likely be improving upon

1 the flow rates currently generated by the project site. Phase I<sup>11</sup> won't be  
2 increasing the flooding problems in Roger's Slough as regulated by the City's  
3 Stormwater Manual. As such, there's no basis for requiring additional  
4 mitigation.

5 In contrast to the flow rates affecting off-site stormwater facilities, the  
6 Appellants have established the flow rates modestly exceed the flow rates  
7 authorized as input to Wetland C. That issue is separately addressed under FOF  
8 No. 6C above.

9 **iii. Cumulative Impacts.** No significant adverse cumulative stormwater  
10 impacts are found associated with the proposal. The proposal will likely be  
11 reducing off-site flows and will use AKART standards to prevent off-site  
12 contamination. In this regard, even in combination with other projects, the  
13 proposal will not contribute to any increase in cumulative adverse impacts.

14 The Appellants assert that off-site flow rates should be assessed cumulatively  
15 with flows generated by other development in the area. The Appellants cited  
16 to the Birch Point Sub-watershed Drainage Study, Ex. C210, which identifies  
17 an 8.8 cfs capacity deficit and an 81.3% increase in the 25-year peak flow in  
18 the project area.

19 The Ex. C210 Study certainly does establish a reasonable likelihood of  
20 increased stormwater flows. However, the report acknowledges that these  
21 increases would be attributable to projects that fail to implement adequate  
22 stormwater flow control. Section 4.1 of the report concludes that “[s]tormwater  
23 runoff will increase with future development **if** stormwater controls are not  
24 properly implemented.” (emphasis added). Section 4.2.2 provides that  
25 “[f]uture conditions peak flows entering the wetland from upland areas (S-1)  
will be higher than existing conditions **if flow control is not provided with  
future development.**” (emphasis added).

The Ex. C210 study doesn't explicitly identify whether it considers DOE  
Stormwater Manual regulations to provide for adequate stormwater controls.  
As previously identified, the City has adopted the DOE Stormwater Manual.  
The DOE Stormwater Manual is what is required for areas subject to Whatcom  
County's National Pollutant Discharge Elimination System (NPDES) Phase II  
permit coverage area. The Ex. C210 study suggests that it considers the Manual  
to be sufficient in Section 3.1 as follows:

---

24 <sup>11</sup> In its plat applications for other Avista phases, the Applicant will be required to  
25 establish no increase in flow rates over predeveloped conditions for the future phases  
as well.

1            *In 2013, the Birch Bay Urban Growth Area (UGA), which includes*  
2            *portions of the Birch Point study area, was added to Whatcom County's*  
3            *National Pollutant Discharge Elimination System (NPDES) Phase II*  
4            *permit coverage area. Coverage under this permit requires the County*  
5            *to implement minimum standards for maintenance of the existing*  
6            *stormwater system. Flow control and water quality treatment for new*  
7            *development will be required to meet more stringent minimum technical*  
8            *requirements specified in the [DOE] Stormwater Manual for Western*  
9            *Washington. However, a significant portion of the Birch Point*  
10           *subwatershed is outside the NPDES boundary and could potentially*  
11           *develop without flow control. **For these areas, an increase in peak***  
12           ***stormwater runoff rates may occur with redevelopment** so the future*  
13           *developed land use condition is included as part of this analysis.*

14           (emphasis added).

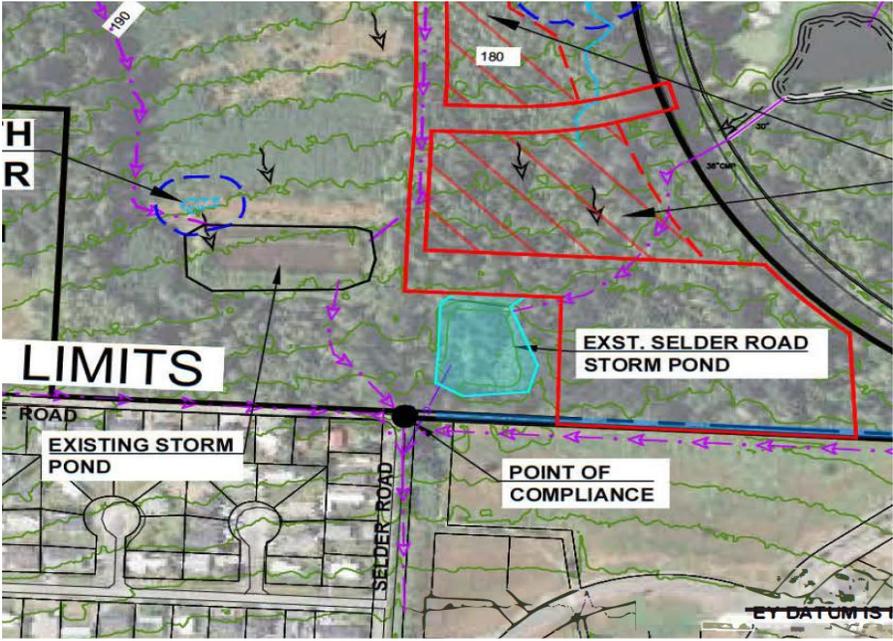
15           If the proposal won't be increasing off-site flows, there's no need for a  
16           cumulative impact analysis on off-site flow rates. The Applicant can't be  
17           required to fix problems caused by other development and the proposal won't  
18           be contributing to those problems. The Applicant's civil engineer testified that  
19           off-site flow rates will not be made any worse by the proposal. Tr. 420. As  
20           previously noted, the off-site flow rates will likely be less as a result of the  
21           proposal. Substantial weight must be given to the findings of the SEPA  
22           responsible official, which includes finding that stormwater impacts are code  
23           compliant and don't increase off-site flow rates. The Appellants have provided  
24           no evidence that the AKART standards integrated into the DOE manual are  
25           insufficient to prevent increases in off-site flows or that the Applicant has failed  
                to meet those standards. The Applicant has established that the proposal will  
                not increase off-site flow rates within the parameters set by the DOE manual.  
                There is no basis to conclude otherwise.

                Appellants have also failed to identify how the City's AKART stormwater  
                regulations fail to prevent cumulative water quality standards. The stormwater  
                AKART water quality standards are derived from the expertise of DOE and the  
                engineers and scientists that help DOE put those standards together. Mr.  
                Pointer only puts up his lay opinion as to the adequacy of those standards. Mr.  
                Pointer asserts that the DOE regulations don't treat for 6PPD-quinone and that  
                this chemical is toxic to fish. That could very well be the case. However, Mr.  
                Pointer presented no studies, expert testimony or any other evidence other than  
                his own lay opinion based upon studies that haven't been admitted into the  
                record. In the absence of any evidence supporting Mr. Pointer's opinion in this  
                administrative record, Mr. Pointer's lay and unsubstantiated opinion on

1 cumulative water quality impacts is not found sufficient to overcome the  
2 AKART expertise on water quality integrated into the City's stormwater  
3 regulations coupled with the substantial weight due to the SEPA responsible  
4 official.

5 *iv. Existing Stormwater Ponds.* The Appellants assert that a couple existing  
6 on-site detention ponds must be brought up to current standards for the  
7 proposal. However, none of these ponds will be used by the development. As  
8 previously noted, the Applicant can only be legally required to mitigate the  
9 impacts it creates. It cannot be required to remedy existing problems.

10 The two existing on-site ponds at issue are in the southeast corner of the project  
11 site as depicted in Figure 1 of the Ex. C21 stormwater report. Figure 1 has been  
12 cropped below to show the two ponds as located just north of the northern  
13 terminus of Selder Road at the southeast boundary of the project site. The pond  
14 overlaid in blue will be referenced as the Selder Pond. The pond to its  
15 northwest outlined in black will be reference as the 30,000 square foot pond.



22 Excerpt of Figure 1 of the Ex. C21 stormwater report.

23 As explained in Section 3.3 of the Ex. C21 stormwater report. The pond  
24 currently receives runoff from the golf course, some residential areas inside the  
25 Semiahmoo Residents Association (SRA), Semiahmoo Parkway, and eastern

1 side of the proposed Avista development<sup>12</sup>. The Avista development is  
2 proposing to ultimately develop approximately 10.1 acres of the 22.6 acres  
3 currently draining into the Selder Pond. Runoff from this developed area will  
4 be diverted to the proposed (not currently existing) Avista Sunrise Development  
5 pond. The proposed pond will treat the stormwater for water quality and then  
6 reduce flow rates to a forest condition before discharging downstream of the  
7 Selder Pond. Ultimately, the diversion to the proposed pond will result in less  
8 flows to the Selder Pond.

9 The 30,000 square foot pond will also not be taking any run-off from the first  
10 phase of the Avista development. The pond will be used for future phases.  
11 Condition No. 25<sup>13</sup> requires the pond to meet DOE Stormwater Manual design  
12 standards for future phases. That issue will be addressed when preliminary plat  
13 applications are submitted that propose to use the 30,000 square foot pond.

14 The Appellants have presented no evidence that the first Avista phase will be  
15 draining into either of the two on-site detention ponds. Instead they assert  
16 without any legal authority or explanation that the ponds should be brought up  
17 to current standards and that they should be maintained. It is uncontested that  
18 the ponds may not meet current design standards. Since the development won't  
19 be using the ponds or impairing the function (other than actually reducing flows  
20 to the Selder pond), the first phase of development is not exacerbating any  
21 adverse impacts created by these ponds and thus has no duty to mitigate those  
22 impacts.

23 **v. *Baseline*.** The proper baseline was used to assess stormwater impacts.

24 The Appellants assert that the City used the wrong baseline for assessing  
25 stormwater impacts. The proper baseline for assessing SEPA impacts is the  
current condition of the existing environment. *King Cnty. v. Friends of  
Sammamish Valley*, 3 Wash. 3d 793, 822, 556 P.3d 132, 147 (2024). The  
pertinent baseline for stormwater impacts is off-site stormwater flows generated

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20 <sup>12</sup> See Section 3.3 of the Ex. C21 stormwater report.

21 <sup>13</sup> The Appellants assert in their closing brief that the Condition No. 25 is an  
22 unpermitted vague promise of future compliance. See p. 6. Far from it, Condition No.  
23 25 relies upon the detailed requirements of the City's Stormwater Manual and makes  
24 the simple clarification that the stormwater facilities meet those standards. As with this  
25 phase, the Applicant will be required to prepare a detailed stormwater report for each  
subsequent phases of development. If any existing stormwater facilities are used for  
that particular phase, the Applicant will have to ensure that the design of the facilities  
meets the design standards to which that phase vests.

1 by the Phase 1 development area. The Appellants assert that the two ponds  
2 discussed above should have been included in the baseline. The current condition  
3 of the environment as related to that baseline is two ponds that likely don't meet  
4 current design standards and are not subject to any maintenance requirements.  
5 Phase 1 development won't be using these ponds or in any way impairing their  
6 function. Since Phase 1 won't be using the ponds, it will not be changing the  
7 baseline of the off-site flows they're generating except to improve upon the  
8 Selden Pond baseline by reducing flows to it. Since the proposal won't be  
9 increasing off-site flow rates from either pond, there's no adverse change in base  
10 line and no corresponding duty to mitigate.

11 The Appellants also assert in their reply brief that the impacts of a stormwater  
12 pond located offsite to the north of the project site was erroneously not included  
13 in the baseline. The proposed development doesn't divert any water into that  
14 off-site pond -- the off-site pond is located upstream from the development site.  
15 The Applicant's civil engineer testified that the flows from the north pond don't  
16 flow into the Phase 1 development area but rather flow to the west instead. Tr.  
17 374. His conclusions are supported by the flow directions depicted in Figure 1  
18 of the Ex. C21 stormwater report. Mr. Pointer alleged in his cross-examination  
19 that the north pond has flooded into the east portion of the site. Tr. 277. Even  
20 if that's the case, there's nothing to suggest that this type of flood event would  
21 result in the proposal exceeding the current baseline of off-site flows generated  
22 by the Phase I development site in violation of the Stormwater Manual flow  
23 control standards .

24 **vi. Climate Change.** The Appellants assert that the hydrological modelling  
25 fails to use current precipitation data that reflects the impacts of climate change.  
However, the Applicant's data is that required by DOE. The Applicant could  
not use more current data short of creating its own computer model and having  
that model approved by DOE.

The Stormwater Manual requires the Applicant to demonstrate via stormwater  
modelling that its stormwater system can meet Manual standards. Section III-  
2.1 limits the modelling to modeling programs approved by DOE. Section III-  
2.2 of the Manual references the DOE stormwater website as listing the currently  
approved stormwater modeling programs. The Applicant's stormwater report  
applied the 2012 edition of the Western Washington Hydrology Model. That  
model was developed in coordination with DOE to model stormwater flow and  
infiltration rates. The 2012 edition of the model as applied in the Ex. C21  
stormwater report uses precipitation data from 1948 through 2009.

The Appellants assert that more recent data is necessary to accurately predict  
new weather patterns caused by climate change. The Appellants cite statistics

1 in their closing brief showing an increase in precipitation over historical patterns.  
2 This information is not admitted into the record because it's based upon studies  
3 that weren't included in the Appellants' exhibit list. However, even if such  
4 information could be considered, models using more recent data have not yet  
5 been approved by DOE. As previously noted, only DOE approved modelling  
6 can be used to model stormwater hydrology. The DOE website in its "Summary  
7 of WWHM2012 Updates" notes that the most recent version uses precipitation  
8 data through 2009 for the Blaine area.

9 No information at the DOE website could be found on any hydrology manual  
10 that has more updated precipitation information than 2009 for the Blaine area.  
11 The Appellants have identified no such manual. The DOE website authorizes  
12 the submission of new models for approval. Given that DOE only has the  
13 resources to update the WWHM model every few years, it would be  
14 unreasonable to expect a developer to make their own model. The record shows  
15 that the Applicant has employed the most recent precipitation data reasonably  
16 available and authorized for its project. Nothing further can be required under  
17 the Stormwater Manual.

18 **vii. Infiltration.** The Appellants challenged the conclusions of the Applicant's  
19 geotechnical engineer that infiltration was not a feasible stormwater control  
20 measure. The Applicant's geotechnical report applied the feasibility criteria of  
21 the geotechnical report to come to this conclusion. Mr. Pointer asserted in his  
22 closing brief without attribution that the infiltration conclusions were based upon  
23 soggy lawns and homeowner preferences. There was no reference to soggy  
24 lawns or homeowner preferences in the geotechnical report. The geotechnical  
25 conclusions were based upon low permeability soils and high perched  
groundwater that could not meet the 3-foot vertical separation requirements of  
the Stormwater Manual. Given these factors, the Applicant's engineer is found  
to have correctly determined in his Ex. C21 stormwater report that infiltration is  
not feasible for the project site.

B. Transportation: The proposal provides for adequate and appropriate  
transportation facilities.

Impacts on transportation infrastructure were assessed in the Applicant's traffic  
impact analysis, Ex. C25. The analysis found that the Avista subdivision is  
estimated to generate over 419 peak-hour trips as determined in the submitted  
traffic impact analysis. The City's adopted intersection level of service (LOS)  
is D. Impacts to the City's road network were found to meet this congestion  
standard with planned City improvements. However, impacts to the  
unincorporated county network did need some proportionate share mitigation  
from the Applicant. The analysis recommended Applicant payment of

1 \$295,118.98 for improvements for two County intersections. Whatcom County  
2 found this amount insufficient and filed its SEPA appeal on that basis. The  
3 settlement agreement between the parties that led to withdrawal of the appeal  
4 increase the required payment to \$678,000 for three intersections.

5 The pending SEPA appeal and October 22 notification of Whatcom County's  
6 intent to withdraw their SEPA appeal based on the voluntary mitigation  
7 agreement precluded issuing a Certificate of Traffic Concurrency prior to the  
8 cutoff date of exhibit submittals to the Hearing Examiner. The proposed  
9 mitigation elements will be incorporated into a Certificate of Traffic  
10 Concurrency issued after the hearing.

11 The proposal will also be subject to traffic impact fees under Chapter 3.80  
12 BMC. Those fees are designed to require payment for proportionate demand  
13 upon the City's park system. Those fees become due during building permit  
14 review.

15 The City's 2009 Non-Motorized Transportation Plan calls for a multimodal trail  
16 and on-street bike lane along Semiahmoo Parkway. The project is not  
17 constructing any portion of the Parkway. As such, on-street bike lanes along  
18 Semiahmoo Parkway will be addressed uniformly by the City during a future  
19 roadway capital project for safety reasons. A separated, 10-foot paved trail  
20 exists today for bicycles and pedestrians. The City's rationale is that requiring  
21 the developer to widen Semiahmoo Parkway drive surface to add a bicycle lane  
22 along the Project frontage would create abrupt and unsafe conditions,  
23 essentially due to a bicycle lane beginning and ending at the Project.

24 BMC17.124 proscribes two spaces per residential unit. The Avista Master Plan  
25 calls for four parking spaces per residence (two in garage plus two in driveway).  
Parking adequacy will be reviewed during the permitting process for each lot  
as well as for all other proposed development.

19 C. Parks and Open Space: The proposal provides for adequate parks and open  
20 space. The Park and Open Space plan depicts a one-acre community park.

21 Phase I offers 6.72 acres (20%) of open space, which includes the 3.15-acre  
22 Nexus Park<sup>14</sup>. Additional open space amenities include two small neighborhood  
23 parks, and a public plaza. A one-hundred-foot buffer (80-foot open space buffer  
volunteered by the Applicant and a 20-foot required PUD buffer) is proposed  
along Semiahmoo Parkway. The draft open space plan included on page 23 of

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24 <sup>14</sup> Other parts of the staff report limit references of parks in the first phase as a one-acre  
25 part. See, e.g. p. 46 Either way, the proposal provides for ample open space.

1 the Avista Master Plan, Ex. C11, lists percentages totaling 35.33 acres (19.5%)  
2 of community open space across the entire 181-acre site, but does not depict  
3 locations of the majority of the required open space. Condition No. 43 requires  
4 the master plan to clearly depict all usable open space areas.

5 The recommendations of the staff report also assure adequate open space  
6 between proposed buildings and to serve as buffering along the project  
7 perimeter. The Applicant had proposed variable setbacks between buildings  
8 along with creation of an architectural committee to authorize even further  
9 reduced setbacks. The staff recommendation, adopted by this recommendation,  
10 set static setbacks that ensure adequate passage of light and air as required by  
11 PUD regulations. The Applicant's 100-foot perimeter buffer provides excellent  
12 buffering to surrounding uses.

13 The proposal will also be subject to park impact fees under Chapter 3.80 BMC.  
14 Those fees are designed to require payment for proportionate demand upon the  
15 City's park system. Those fees become due during building permit review.

16 D. Water and Sewer: The proposal appears to provide for adequate and  
17 appropriate sewer and water. Public works has recommended several  
18 conditions adopted by this recommendation designed to provide for adequate  
19 water and sewer infrastructure consistent with City public works standards.  
20 Public works determined in Ex. C52 that as described in the 2021  
21 Comprehensive Water System Plan and based on supply calculations since  
22 issuance of the plan, the City has adequate installed source of supply.

23 E. Schools and Walking Conditions to Schools: As conditioned, the subject site  
24 is served by adequate and appropriate school facilities and safe walking  
25 conditions to and from school.

The Blaine School District will be serving the project site. Consideration of  
school bus stop locations and safe walking conditions to school was not  
provided. The nearest public school is located almost six miles from the Avista  
Property. Condition 35 requires the Applicant to consult with the Blaine School  
District to determine the best placement for school bus stops. This includes an  
assessment of the walking conditions to identify school bus stops. To the extent  
proportionate to project impacts, the Applicant shall install improvements as  
necessary to assure safe walking conditions to school bus stops as part of their  
construction drawings and shall be included in approved civil plans.

F. Public Services. The proposal provides for adequate public services. The City  
Public Works Department has reviewed the Avista Project for public services

1 availability and submitted a list of recommendations, Ex. C52, that are included  
2 as recommended conditions of approval.

3 8. Superior Design. The proposed PUD design is superior and more creative than  
4 would be offered under preliminary plat review. The design includes a community park,  
5 private open spaces and transition buffer areas, an integrated pedestrian circulation plan  
6 providing internal circulation and transportation options to the east-west and north-south,  
7 varied lot sizes to add visual interest, and recreation facilities. Conceptual architectural  
8 renderings have been provided that indicate the style of homes and construction. As an  
9 integrated whole, the staff report (based upon expert planner opinion) concludes that the  
10 project shows more creativity and integrated design than would be seen in a typical  
11 single-family residential development created under the subdivision regulations alone.

## 12 CONCLUSIONS OF LAW

### 13 Procedural:

14 1. Authority of Hearing Examiner. BMC 2.58.070.B.1 and B2 authorizes the  
15 hearing examiner to conduct an open record hearing and make recommendations to the  
16 city council for PUD and preliminary plat applications.

### 17 Substantive:

18 2. Zoning. The project area is zoned Residential Planned Recreation (RPR).

19 3. CAO Determination. The City's Ex. C26 CAO Determination cannot be  
20 collaterally challenged in this proceeding. As pertinent, its findings of consistency with  
21 Wetland and Critical Aquifer Recharge regulations cannot be revisited. The Examiner  
22 would only have jurisdiction over that issue if the determination had been timely  
23 appealed.

24 BMC 17.82.065C authorizes CAO determination applications to be filed without an  
25 accompanying development permit application. The Applicant submitted their  
application and acquired approval prior to their preliminary plat and PUD applications.  
The application was approved July 6, 2023. The Applicant filed its plat and PUD  
applications on April 8, 2024. The CAO determination found that the application  
"meets the critical area standards established in BMC Chapter 17.82." The standards  
in Chapter 17.82 include protection of CARAs and wetlands. See BMC 17.82.490-  
17.82.510; BMC 17.82.300-17.82.360.

The findings of CAO consistency with the City's CAO determination cannot be  
collaterally challenged during plat and PUD review absent a timely filed administrative  
appeal of the determination. The Washington State Supreme Court has ruled multiple

1 times that final land use decisions cannot be collaterally challenged in subsequent  
2 permit review. *Habitat Watch v. Skagit Cnty.*, 155 Wn.2d 397, 120 P.3d 56 (2005)  
3 (challenge to grading permit amounted to untimely collateral attack of earlier special  
4 use permit, where authorization for grading permit came from special use permit,  
5 whose appeal period had passed, and where sole basis for challenging grading permit  
6 was that extensions of special use permit were improper); *Chelan Cnty. v. Nykreim*, 146  
7 Wn.2d 904, 52 P.3d 1(2002); *Wenatchee Sportsmen Ass'n. v. Chelan Cnty.*, 141 Wn.2d  
169, 4 P.3d 123 (2000) (challenge to county's approval of plat application based on  
challenge to density of plat was untimely collateral attack where petitioner had not  
challenged rezone decision establishing allowed density for project two years earlier);  
see also *BD Lawson Partners, LP v. City of Black Diamond*, 165 Wn. App. 677, 690,  
269 P.3d 300 (2011).

8 The Appellants understandably question how they could be required to appeal a permit  
9 when they receive no notice of it. That due process argument was addressed in  
10 *Durland v. San Juan Cnty.*, 182 Wash. 2d 55, 340 P.3d 191 (2014). In *Durland*, the  
11 San Juan County Hearing Examiner dismissed an appeal of a building permit because  
12 it failed to conform to the 21 day appeal deadline for building permit appeals to the  
13 hearing examiner. *Durland* appealed on due process grounds, arguing it was  
inequitable to require an appellant to comply with appeal deadlines for permits issued  
without public notice. The Supreme Court upheld the Examiner's dismissal,  
summarizing its holding

14 *In this consolidated case, petitioners brought an untimely challenge to San*  
15 *Juan County's issuance of a garage-addition building permit. Petitioners*  
16 *did not receive notice of the permit application and grant until the*  
17 *administrative appeals period had expired. Thus, petitioners claim that our*  
18 *court's interpretation of the Land Use Petition Act (LUPA), chapter*  
19 *36.70C RCW, required them to do the impossible: to appeal a decision*  
20 *without actual or constructive notice of it. While this result may seem harsh*  
21 *and unfair, to grant relief on these facts would be contrary to the statutory*  
22 *scheme enacted by the legislature as well as our prior holdings. Indeed,*  
23 *we have acknowledged a strong public policy supporting administrative*  
24 *deadlines and have further explained that "[I]eaving land use decisions*  
25 *open to reconsideration long after the decisions are finalized places*  
*property owners in a precarious position and undermines the Legislature's*  
*intent to provide expedited appeal procedures in a consistent, predictable*  
*and timely manner." Chelan County v. Nykreim, 146 Wash.2d 904, 933,*  
*This court has faced numerous challenges to statutory time limits for*  
*appealing land use decisions and has repeatedly concluded that the rules*  
*must provide certainty, predictability, and finality for land owners and the*  
*government....* ...

1 182 Wash. 2d at 59–60.

2 Durland’s holding in part was based upon the fact that Mr. Durland had no protected  
3 property interest at stake in his appeal. Durland appealed the building permit because  
4 it authorized a building height next to his home that he believed to violate County  
5 height standards. The Court found no protected private property interest because the  
6 County’s height standards referenced protection of public views but not private views.  
7 182 Wash. 2d at 74.

8 The intent section of the City’s CAO doesn’t indicate whether its protections are  
9 directed at the public generally or persons in particular. Safe drinking water is certainly  
10 a more significant consideration than view impacts, but the degree of impact didn’t  
11 appear to be a relevant consideration in the Durland’s analysis of public verses private  
12 entitlement. The only indication on the entitlement nature of the regulations is BMC  
13 17.82.010C6, which provides that one of 17.82’s objectives is to protect the “public”  
14 from natural hazards such as flooding. Absent any clearer indication of any protection  
15 of private interests, the notice procedure itself for CAO Determination process is  
16 determinative. The City Council didn’t find the private interests of potentially affected  
17 residents to be significant enough to merit any notice requirement for issuance of a  
18 CAO determination. That is a fairly strong indication of the legislative intent for the  
19 City Council on protecting private interests in the City’s aquifer and wetlands.

20 One case contrary to the holding in *Durland* is *Gardner v. Pierce Cnty. Bd. of Comm'rs*,  
21 27 Wn. App. 241, 617 P.2d 743 (1980). In *Garland* the Supreme Court didn’t hold an  
22 appellant to an appeal deadline for a negative declaration of negative environmental  
23 impact (apparently a precursor to the DOE’s adoption SEPA rules governing mitigated  
24 determinations of non-significance). The Court ruled that “[t]o require petitioner to  
25 file an appeal 10 days before the hearing under these circumstances [without prior  
notice] would be unreasonable and violative of due process.” 27 Wash. App. At 243.

26 The holding of *Gardner* is directly at odds with the holding of *Durland*. *Gardner*  
27 involved a 29.2-acre preliminary plat. In this regard the impacts of the subdivision  
28 were more analogous to the impacts of the subject proposal than the single-family home  
29 at issue in *Durland*. Due process is a highly subjective legal standard and a court could  
30 conceivably find a distinction between the interests implicated in the construction of a  
31 single-family home verses those in a multi-unit plat. However, the more compelling  
32 position to take is that *Gardner* has been effectively overruled by the long line of cases  
33 that have “repeatedly concluded” (as identified in the *Durland* quote above) that appeal  
34 deadlines must be enforced. Those cases commenced with *Nykriem* in 2002, more than  
35 20 years after the *Gardner* decision. Modern case law strongly dictates finality in the  
City’s CAO Declaration. Its findings of CAO consistency on CARAs and wetlands  
can not be collaterally attacked in this proceeding.

1 It is acknowledged that finality case law is ultimately based upon strong finality  
2 legislation applicable to judicial land use appeals. RCW 36.70C.040(2) provides that  
3 “[a] land use petition is barred, and the court may not grant review, unless the petition  
4 is timely filed with the court and timely served on the following persons...” The City’s  
5 appeal filing requirements are not as strongly worded. They simply require that appeals  
6 be filed “within 14 days of the issuance of the formal written decision.” See BMC  
7 17.06.180A2. Although the City’s wording may not be as strong for finality as  
8 RCW36.70C.040(2), the policy reasons for finality repeatedly referenced in the judicial  
9 finality cases is just as strong. Further, authorizing collateral attacks would render the  
10 14-day appeal deadline meaningless for projects involving permits with public  
11 hearings. Given these factors, the most compelling interpretation is that the City’s  
12 administrative appeal deadlines invoke finality in the same manner as the 21-day  
13 judicial appeal deadline imposed by RCW 36.70C.040(2).

14 Although CAO compliance is beyond examiner jurisdiction, the argument could be  
15 made that SEPA policies can serve as an alternative means of protecting aquifers and  
16 wetlands that can be applied in addition to any CAO Determination review. A  
17 pertinent case on this issue is *Quality Rock v. Thurston County*, 139 Wn. App. 125  
18 (2007). *Quality Rock* addressed the impact of a SEPA review on the ability of Thurston  
19 County to impose further mitigation under a special use permit on a proposed gravel  
20 pit expansion. Groundwater located at the gravel pit recharged the nearby Black River.  
21 A MDNS was issued for the project without any mitigation measures addressing  
22 recharge impacts to the Black River. The hearing examiner approved the special use  
23 permit without any mitigation for Black River impacts. On appeal, the Thurston  
24 County Board of Commissioners denied the special use permit, finding that the  
25 location for the gravel pit was not appropriate given its potential impacts to the Black  
River.

The *Quality Rock* Applicant appealed the denial to superior court, arguing in part that  
under principles of judicial finality the County could not find the location inappropriate  
under special use permit criteria because the MDNS had to be based upon a finding  
that the proposal would create no probable significant adverse environmental impacts.  
The Court of Appeals disagreed, noting that one of the criteria for special use permit  
approval was that the proposed use would not result in substantial or undue adverse  
affects to the natural environment. 139 Wn. App. At 141. Notably, the court found it  
significant that the County issued the MDNS without access to most of the Black River  
information that the hearing examiner and Board of Commissioners based their  
decision upon. The environmental checklist didn’t even identify the Black River as a  
surface water body in the project vicinity.

The *Quality Rock* decision is somewhat difficult to reconcile with the *Habitat Watch*  
case, which expressly states that one permit review cannot be used to “collaterally  
challenge” another final land sue decision that wasn’t timely appealed. *Habitat Watch*,

1 155 Wash. 2d at 410. It is significant that, as in *Quality Rock*, the CAO Determination  
2 doesn't expressly address the CARA issue "collaterally" reviewed by the Appellants in  
3 their SEPA appeal. However, *Quality Rock* did deal with the more specific criteria of  
4 a special use permit used to "collaterally" review an issue that could have been  
5 reviewed in the broader criteria of SEPA. This case is reversed with the collateral  
6 review following the much more specific criteria of the CAO review.

7 Reconciling *Quality Rock* with *Habitat Watch*, the specific CAO Determination that  
8 the proposal complies CAO regulations is determinative of CAO compliance.  
9 Although the Determination doesn't mention aquifers, it is reasonable to presume that  
10 as a matter of standard course City planning staff noted that the City's CAO map  
11 doesn't identify the project area as within a CARA and thus no mitigation is necessary.  
12 Given that the City's CAO CARA standards are more specific than any other SEPA  
13 policies addressing the same issue, the CAO CARA standards are also found to  
14 supersede rather than compliment any more broad based SEPA policies. SEPA policies  
15 that addressed aquifer issues that the CAO wasn't designed to address could still be  
16 applicable. However, no such policies are evident given that the CAO CARA  
17 regulations broadly require that CARA studies within designated CARAs shall identify  
18 the mitigation measures "*necessary to reduce potential impacts to groundwater  
19 resources.*"

20 4. Permit Review Criteria: The PUD application is required for development  
21 within the RPR zone<sup>15</sup>. Planned unit development amendments are subject to the  
22 review criteria imposed by BMC 17.68.080. Preliminary Plat criteria are set by BMC  
23 17.60.150. Relevant review criteria are quoted below and applied via accompanying  
24 conclusions of law.

### 25 **Preliminary Plat**

**17.60.150** *Preliminary plat criteria for approval.*

*The city council shall make the following findings upon approving a preliminary plat:*

**BMC 17.60.150A.** *The preliminary plat is generally consistent with the goals and  
policies of the comprehensive plan;*

5. Criterion met. The criterion is met. The proposal is consistent with the  
Comprehensive Plan for the reasons identified at page 15 of the staff report.

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<sup>15</sup> BMC 17.38.010 requires that "[d]evelopments under this chapter shall be subject to  
the procedures for application and approval described in Chapter 17.68 BMC [PUD  
Chapter]."

1 **BMC 17.60.150B.** *The preliminary plat is consistent with the applicable zoning,*  
2 *critical areas, shoreline, Growth Management Act goals and policies, and State*  
3 *Environmental Policy Act regulations;*

4 6. Criterion met. The criterion is met. The proposal is consistent with the City's  
5 Zoning Code for the reasons identified at pages 17-24 of the staff report, is consistent  
6 with the City's CAO as outlined in Finding of Fact 6B and doesn't involve any  
7 shorelines subject to the shoreline management act. The proposal is consistent with  
8 the Growth Management Act because it provides for urban densities in an urban growth  
9 area while protecting critical areas under its CAO. The proposal is consistent with  
10 SEPA because the City has issued an MDNS that conforms to SEPA standards as  
11 determined in this recommendation.

12 The staff report identifies that a departure should be approved to avoid conformance  
13 problems with BMC 17.38.055A1. That provision requires housing architecture to be  
14 "aesthetically" consistent and compatible with other homes in the district. The  
15 Applicant has requested that this provision be waived because the age of other home  
16 designs in the district don't meet modern aesthetics and the subjective nature of  
17 assessing compatibility.

18 The staff report correctly identifies that BMC 17.38.055A1 is difficult to enforce  
19 because of its subjective terms. As noted in the staff report, RCW 36.70A.630 requires  
20 design standards to be based upon "clear and objective development regulations."  
21 However, RCW 36.70A.630(5), adopted in 2023, only requires its requirements to be  
22 integrated into city code by the time the next periodic update becomes due. RCW  
23 36.70A.130(5)(b) required Blaine to have its next update completed by December 31,  
24 2025. Blaine is still in that update process. However, even if RCW 36.70A.630 doesn't  
25 yet apply, case law provides that an ordinance violates due process if its terms are so  
vague that persons of common intelligence must necessarily guess at its meaning and  
differ as to its application. *Anderson v. City of Issaquah*, 70 Wash. App. 64, 75, 851  
P.2d 744, 751 (1993). With or without RCW 36.70A.130, BMC 17.38.055A1 can only  
be used to restrict design in a manner that reasonable minds would agree are required.

Unfortunately, there doesn't appear to be any authorized "PUD Departure" process for  
BMC 17.38.055A1. There is nothing in the RPR zoning district or the PUD standards  
that authorizes any waiver of the BMC 17.38.055A1 aesthetic standard. The purpose  
clause of the RPR district and PUD chapter both emphasize that the zoning district and  
PUD standards are designed to provide for flexibility in design. See BMC 17.68.010  
and BMC 17.38.010A. That flexibility, however, is expressly addressed in numerous  
PUD and RPR standards. BMC 17.38.060, for example, expressly doesn't set any  
standards for setbacks, land coverage, height limit or lot width. All of those standards  
are open for consideration and final approval in the master plan review process.

1 An intent or purpose section by itself is not a development regulation that authorizes  
2 or restricts land use. *See Indian Trail Prop. Owner's Ass'n v. City of Spokane*, 76 Wash.  
3 App. 430, 438, 886 P.2d 209, 215 (1994)(upholding hearing examiner decision that  
4 declined to apply zoning code provision because it was only a purpose clause). The  
5 staff report identifies no authorization in the BMC to waive BMC 17.38.055A1. The  
6 proposal must either establish compliance with BMC 17.38.055A1 or acquire a  
7 variance.

8 Ultimately, the proposal is found to comply with BMC 17.38.055A1 because the bulk  
9 and dimensional standards applicable to the proposal are consistent with that of other  
10 homes in the district. The Examiner has no authority to invalidate BMC 17.38.055A1  
11 as unconstitutional or inconsistent with RCW 36.70A.630. However, the Examiner can  
12 interpret BMC 17.38.055A1 in a manner that is consistent with those external  
13 requirements. Building height is construed as an architectural feature under BMC  
14 17.38.055A1. The height authorized by this recommendation for single-family homes  
15 is 35 feet. As noted in page 23 of the staff report, a 35-foot height limit is typical of  
16 the City's residential districts, which presumably includes the RPR district. Subject to  
17 similar height standards as the other homes in the RPR district, the proposed homes are  
18 found to comply with BMC 17.38.055A1 given the restricted enforceability of that  
19 provision.

20 **BMC 17.60.150C.** *The application complies with lot and plat design standards as  
21 required under Chapter 17.74 BMC, Subdivision Design Requirements, unless  
22 specifically varied through the process outlined in Chapter 17.62 BMC, Plat Variance,  
23 or Chapter 17.68 BMC, Planned Unit Development (PUD);*

24 7. Criterion met. The criterion is met. Chapter 17.74 addresses subdivision design  
25 standards. With the exception of the departures identified below, the City's Public  
Works Department has found the proposal consistent with the City's street design  
standards in Ex. C52 and there is no evidence to the contrary.

The staff report identifies two recommended unauthorized "PUD departures" from  
subdivision design standards. These are composed of the following: (1) waiving BMC  
17.74.080.C requirement for wooden light poles; and (2) waiving sidewalk standards  
as depicted in Ex. C9. There is no provision in the PUD standards that authorizes  
waiver of the light pole and sidewalk standards. As outlined in COL No. 5, there is  
thus no authority to waive those standards under the PUD process. However, the  
introduction to BMC 17.74.80 authorizes the community development and public  
works directors to "together" authorize alternatives "when determined to better serve  
public health, safety and welfare." Condition 95 requires the light pole and sidewalk  
departures such to only be allowed via authorized deviation process as opposed to  
nonexistent PUD departures.

1 The remaining street standard departure identified in the staff report is expressly  
2 authorized as a “PUD departure.” The Applicant has requested a reduction in required  
3 right of way width. The staff report recommends approval. BMC 17.74.080(2)a allows  
4 reductions in right of way width at the discretion of the public works director via  
5 “[s]tandards established through the planned unit development process.”<sup>16</sup> Given the  
6 recommendation of City staff, which presumably includes the Public Works Director,  
7 the requested reductions in right of way width are approved.

8 **BMC 17.60.150D.** *That the subdivision and related dedication will serve the public  
9 interest, and not be detrimental to the public health, safety and general welfare;*

10 8. Criterion met. The criterion is met since the proposal will provide additional  
11 housing in an urban growth area while not creating any adverse impacts as determined  
12 in Finding of Fact No. 6.

13 **BMC 17.60.150E.** *Appropriate provisions are made for, but not limited to, open spaces  
14 and drainage ways; roads, streets, alleys and transit stops; potable water supply,  
15 sanitary sewer, electricity and franchise utilities; parks and recreation; sidewalks and  
16 other pedestrian corridors; and facilities that preserve the quality of the neighborhood;*

17 9. Criterion met. The criterion is met for the reasons identified in Finding of Fact No.  
18 7.

19 As in prior PUD reviews, BWC asserts that the City must use the 2024 DOE stormwater  
20 manual as opposed to the vested 2019 DOE manual. The City is legally required to use  
21 the 2019 manual. RCW 58.17.033 vests (grandfathers) preliminary plat applications  
22 to the development standards in effect at the time a complete application is filed. The  
23 2019 manual was in effect when the proposal vested.

24 Stormwater manuals in communities where the DOE manuals are mandatory are not  
25 subject to vesting under the court opinion of *Snohomish Cnty. v. Pollution Control  
Hearings Bd.*, 187 Wash. 2d 346 (2016). However, adoption of the DOE manual is not  
mandated for Blaine. Consequently, its stormwater regulations are still subject to  
vesting.

Adoption of the DOE Stormwater Manual is only required for cities and counties in  
Western Washington that are subject to the National Pollutant Discharge Elimination  
System (NPDES) Western Washington Phase I Municipal Stormwater Permit for

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<sup>16</sup> This section could also apply to the reduced sidewalk request since sidewalks are presumably included  
in the cross-sections subject to BMC 17.74.080B2. However, the staff report framed the sidewalk  
departure request as a deviation from BMC 17.74.080E, which doesn’t expressly provide for PUD  
departures.

1 adoption of the manual. Blaine is not subject to that requirement. Id, Section S1D2ai;  
2 [https://ecology.wa.gov/regulations-permits/permits-certifications/stormwater-general-](https://ecology.wa.gov/regulations-permits/permits-certifications/stormwater-general-permits/municipal-stormwater-general-permits#municoverage)  
3 [permits/municipal-stormwater-general-permits#municoverage](https://ecology.wa.gov/regulations-permits/permits-certifications/stormwater-general-permits/municipal-stormwater-general-permits#municoverage). Some confusion may  
4 be caused by the fact that Whatcom County is required to adopt the manual while  
5 Blaine is not. Id.

6 The *Snohomish County* case doesn't apply to Blaine because it has no obligation under  
7 the NPDES permit to adopt the DOE Stormwater Manual. The *Snohomish County* court  
8 was faced with reconciling timing requirements of the NPDES permit that were  
9 contrary to the vesting requirements of RCW 58.17.033. The NPDES permit under  
10 review required specified stormwater regulations to go into effect by July 1, 2015 for  
11 specified jurisdictions such as Snohomish County. The NPDES permit provided that  
12 the new regulations would apply to all developments approved prior to July 1, 2015 if  
13 those developments hadn't yet commenced construction. As an example, if a developer  
14 vested under RCW 58.17.033 to a 2005 version of the DOE Stormwater Manual in  
15 2014, the NPDES permit still required enforcement of new required stormwater  
16 regulations adopted in 2015 if construction hadn't yet commenced.

17 The *Snohomish County* court ruled that the NPDES timing requirement was not subject  
18 to RCW 58.17.033 vesting. RCW 58.17.033 only requires vesting for "land use  
19 controls." The *Snohomish County* court ruled that the NPDES permit requirement was  
20 not a "land use control" as contemplated by the state legislature because it was a state  
21 mandate as opposed to a local regulation adopted under municipal discretion 187  
22 Wn.2d at 362.

23 In contrast to jurisdictions such as Snohomish County, Blaine is not subject to the  
24 NPDES mandate. As previously noted, Blaine isn't required by state law to adopt any  
25 version of the DOE Stormwater Manual. As such, the Stormwater Manual as adopted  
26 by Blaine is still a regulation it has adopted as an exercise of its municipal discretion. It  
27 thus still qualifies as a "land use control" subject to vesting under RCW 58.17.033.  
28 Even if the City wanted to, it could not impose the 2024 DOE Stormwater Manual upon  
29 cities that vested to the 2019 DOE Stormwater Manual.

30 Many cities that aren't subject to the NPDES mandate don't even bother to adopt the  
31 most recent version of the Stormwater Manual. Port Townsend, for example, has  
32 adopted the 2005 Stormwater Manual. See PTMC 13.32.010. Even if the City could  
33 impose the 2024 edition, the Appellants have identified nothing in the latest edition that  
34 would better protect surrounding properties from flooding impacts. The Applicant's  
35 engineer testified that the 2024 edition had no provisions that improved upon the off-  
36 site flow restrictions of the 2019 edition. Tr. 419. The Appellants have yet to identify  
37 any difference.

1 **BMC 17.60.150F.** *That all applicable requirements of Chapter 58.17 RCW et seq., not*  
2 *included above, have been met.*

3 10. Criterion met. The criterion is met. The most notable difference between City  
4 standards and Chapter 58.17 RCW is that the City standards don't expressly require  
5 safe walking conditions to and from school as required by RCW 58.17.110. This  
6 standard has been met by adding a condition requiring a safe walking condition  
7 assessment and mitigation as outlined in Finding of Fact No. 7E.

## 8 PUD

### 9 **BMC 17.68.080 Criteria for approval.**

10 *The city may approve a PUD application only if it finds that the following requirements*  
11 *have been met:*

12 **BMC 17.68.080A. Design:** *The PUD represents a more creative approach to the*  
13 *unified planning of development and incorporates a higher standard of integrated*  
14 *design and amenity than could be achieved under otherwise applicable zoning district*  
15 *and subdivision regulations, and solely on this basis modifications to the use and*  
16 *design standards established by such regulations are warranted.*

17 11. Criterion met. The criterion is met for the reasons identified in Finding of Fact No.  
18 8.

19 **BMC 17.68.080.B Meets PUD Requirements:** *The PUD meets the requirements for*  
20 *a PUD set forth in this chapter.*

21 12. Criterion met. The criterion is met. Staff has reviewed the proposed application and  
22 the review process and affirmatively found that the proposal meets all applicable PUD  
23 procedural requirements. Conformance to the PUD review criteria is assessed and  
24 found compliant in this recommendation.

25 **BMC 17.68.080.C. Consistent with Comprehensive Plan:** *The PUD is generally*  
*consistent with the objectives of the city comprehensive plan as viewed in light of any*  
*changed conditions since its adoption.*

13. Criterion met. The criterion is met for the reasons identified in Conclusion of Law  
No. 5.

**BMC 17.68.080.D. Public Welfare:** *The PUD will not be detrimental to the public*  
*health, safety, morals, or general welfare.*

14. Criterion met. The criterion is met because the proposal will not create significant  
adverse impacts as determined in Finding of Fact No. 6.

1 **BMC 17.68.080.E. Compatible with Environs:** *Neither the PUD nor any portion*  
2 *thereof will be injurious to the use and enjoyment of other properties in its vicinity,*  
3 *substantially impair property values or environmental quality in the neighborhood, nor*  
4 *impede the orderly development of surrounding property.*

5 15. Criterion met. The criterion is met for the reasons identified in Finding of Fact No.  
6 6.

7 **BMC 17.68.080.F. Natural Features:** *The design of the PUD is as consistent as*  
8 *practical with the preservation of natural features of the site such as stands of mature*  
9 *trees, steep slopes, natural drainage ways, wetlands, or other areas of sensitive or*  
10 *valuable environmental character.*

11 16. Criterion met. The criterion is met for the reasons identified in Finding of Fact No.  
12 6D.

13 **BMC 17.68.080.G. Circulation:** *Streets, sidewalks, pedestrian ways, bicycle paths,*  
14 *off-street parking, and off-street loading as appropriate to the planned land uses are*  
15 *provided. They are adequate in location, size, capacity, and design to ensure safe and*  
16 *efficient circulation of pedestrians, automobiles, trucks, bicycles, fire trucks, garbage*  
17 *trucks, and snow plows as appropriate without blocking traffic, creating unnecessary*  
18 *pedestrian-vehicular conflict, creating unnecessary through traffic within the PUD, or*  
19 *unduly interfering with the safety or capacity of adjacent streets.*

20 17. Criterion met. The criterion is met for the reasons identified in Finding of Fact No.  
21 7B. As noted in Finding 7B, Public Works staff has found the proposal consistent with  
22 the City's street design standards. Those standards assure safe and efficient circulation.

23 **BMC 17.68.080.H. Open Space and Landscaping:** *The quality and quantity of public*  
24 *and common open spaces and landscaping provided are consistent with the higher*  
25 *standards of design and amenity required of a PUD. The size, shape, and location of a*  
*substantial portion of total public and common open space provided in residential*  
*areas render it usable for recreation purposes.*

*1. Open space between all buildings is adequate to allow for light and air, for*  
*access by fire-fighting equipment, and for privacy where walls have windows,*  
*terraces, or adjacent patios. Open space along the perimeter of the development*  
*is sufficient to protect existing and permitted future uses of adjacent property from*  
*adverse effects from the development.*

18. Criterion met. The criterion is met for the reasons identified in Finding of Fact No.  
7C. The City's fire code standards as set by its adopted International Fire code requires  
separation between the proposed single-family homes that assures fire safety and  
adequate fire access.

1 **BMC 17.68.080.I. Covenants:** *Where individual parcels or condominiums are to be*  
2 *later sold, adequate provision has been made in the form of deed restrictions,*  
3 *homeowners or condominium associations and bylaws or CC&Rs all in a form*  
4 *approved by the city, for the preservation and maintenance of any open spaces,*  
5 *thoroughfares, utilities, water retention or detention areas, and other common*  
6 *elements not to be dedicated to the city or another public body, including such control*  
7 *of the use and exterior design of individual structures, if any, as is necessary for*  
8 *continuing conformance to the PUD plan. Such a provision must be binding on all*  
9 *future ownership.*

10 19. Criterion met. Draft CC&Rs have been submitted, Ex. C12. The CC&Rs propose  
11 measures to preserve and maintain the Avista development.

12 **BMC 17.68.080.J. Public Services:** *The land uses, intensities, and phasing of the PUD*  
13 *are consistent with the anticipated ability of the city, the school districts, and other*  
14 *public bodies to provide and economically support police and fire protection, water*  
15 *supply, sewage disposal, schools, and other public facilities and services without*  
16 *placing undue burden on existing residents and businesses.*

17 20. Criterion met. The criterion is met for the reasons identified in Finding of Fact No.  
18 7F.

19 **BMC 17.68.080.K. Phasing.** *Each development phase of the PUD shall, together with*  
20 *any phases that preceded it, exist as an independent unit that meets all of the foregoing*  
21 *criteria and all other applicable regulations herein even if no subsequent phase should*  
22 *ever be completed. The provision and improvement of public or common area*  
23 *improvements, open spaces, and amenities, or the provision of financial sureties*  
24 *guaranteeing their improvement, is phased generally proportionate to the phasing of*  
25 *the number of dwelling units or amount of non-residential floor area.*

26 21. Criterion met. According to the staff report, the initial phase under consideration  
27 will stand alone as an independent subdivision. Condition 40 requires that each phase  
28 stand alone. Public and common area improvements, open spaces, and amenities will  
29 be phased proportionally.

## SEPA APPEAL

30 21. SEPA Review Criteria -- Impacts. The most important inquiry for purposes of  
31 assessing whether the City responsible official staff correctly issued an MDNS is whether  
32 the project as proposed has a probable significant environmental impact. See WAC 197-  
33 11-330(1)(b). WAC 197-11-782 defines “probable” as follows:

34 *‘Probable’ means likely or reasonably likely to occur, as in ‘a reasonable*  
35 *probability of more than a moderate effect on the quality of the environment’ (see*  
*WAC 197-11-794). Probable is used to distinguish likely impacts from those that*

1 *merely have a possibility of occurring, but are remote or speculative. This is not*  
2 *meant as a strict statistical probability test.*

3 If such impacts are created, conditions will have to be added to the MDNS to reduce impacts  
4 so there are no probable significant adverse environmental impacts. In the alternative, an  
5 environmental impact statement would be required for the project. In assessing the validity  
6 of a DNS, the determination made by the County's SEPA responsible official shall be  
7 entitled to substantial weight. WAC 197-11-680(3)(a)(viii).

8 In assessing whether an impact is significant, it's also appropriate to use development  
9 standards to serve as a benchmark. The use of regulations and adopted plans to substitute  
10 for environmental review was first expressly legislatively sanctioned in 1995 in the  
11 Regulatory Reform Act, Chapter 36.70B RCW. The legislature intended the Act to make  
12 project review more efficient and less confusing to the public. In this regard the legislature  
13 adopted RCW 36.70B.030 to require that "[f]undamental land use planning choices made  
14 in adopted comprehensive plans and development regulations shall serve as the foundation  
15 for project review." RCW 36.70B.030(1). RCW 36.70B.030(4) further provides that  
16 pursuant to RCW 43.21C.240, "a local government may determine that the requirements  
17 for environmental analysis and mitigation measures in development regulations and other  
18 applicable laws provide adequate mitigation for some or all of the project's specific adverse  
19 environmental impacts to which the requirements apply."

20 RCW 43.21C.240(3) prohibits SEPA mitigation for impacts that have already been  
21 adequately addressed in existing development standards and comprehensive plans.  
22 Implementation of RCW 43.21C.240 is outlined in more detail in the Department of  
23 Ecology's adoption of WAC 197-11-158. WAC 197-11-158(2)biiA authorizes a finding  
24 of adequate mitigation upon a determination that the legislative body has designated  
25 impacts as acceptable under its development standards and/or policies.

26 The Avista project will not generate any probable, significant adverse impacts for the  
27 reasons identified in FOF No. 6 and 7. In assessing impacts, the City's SEPA Staff Report  
28 identified reliance upon City development standards as contemplated by WAC 197-11-158  
29 by identifying reliance upon evaluations of impacts by qualified professionals who in turn  
30 based their assessments on City development standards for mitigating impacts of the project  
31 that included stormwater, traffic and wetlands. Ex. C230, Pg. 15-22.

32 22. SEPA Review Sufficient. The second most important inquiry in a SEPA appeal is  
33 whether environmental impacts have been adequately assessed.

34 Washington courts have stressed that, for a threshold determination to meet the procedural  
35 requirements of SEPA, the record "*must indicate that the agency has taken a searching,*  
*realistic look at the potential hazards and, with reasoned thought and analysis, candidly*  
*and methodically addressed those concerns.*" *Conservation Nw. v. Okanogan Cnty.*, 194

1 Wn. App. 1034, 2016 WL 3453666 at \*31 (quoting Found. on Econ. Trends v. Weinberger,  
2 610 F. Supp. 829, 841 (D.D.C May 31, 1985)). SEPA determinations must be “*rational*  
3 *and well-documented.*” *Columbia Riverkeeper v. Port of Vancouver*, 188 Wn.2d 80, 92,  
4 392 P.3d 1025 (2017) (quoting 24 Wash. Practice: Environmental Law and Practice § 17.1,  
5 at 192). The threshold determination must be based on “*complete disclosure of*  
6 *environmental consequences.*” *Alpine Lakes Prot. Soc’y v. Dep’t of Nat. Res.*, 102 Wn. App.  
7 1, 15–16 (1999) (citing *King Cnty. v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648,  
8 663, 860 P.2d 1024 (1993)). “*SEPA demands a ‘thoughtful decision-making process’ where*  
9 *government agencies ‘conscientiously and systematically consider environmental values*  
10 *and consequences.’* *Wild Fish Conservancy v. Wash. Dep’t of Fish & Wildlife*, 198 Wn.2d  
11 846, 873, 502 P.3d 359 (2022) (quoting *ASARCO, Inc. v. Air Quality Coal.*, 92 Wn.2d 685,  
12 700 (1979) and Richard L. Settle, *The Washington State Environmental Policy Act: A Legal*  
13 *and Policy Analysis* § 3.01[2] at 3–4 (2021)).

14 In applying the adequacy standards identified above, it is important to recognize that an  
15 assessment of adequacy of review is based upon the entire record of the appeal, not just  
16 information considered prior to issuance of the threshold determination. The standard for  
17 SEPA review is the clearly erroneous standard in light of the entire record: “[r]ather, we  
18 review the entire record and determine whether, based on the entirety of the evidence, we  
19 are ‘left with the definite and firm conviction that a mistake has been committed.’” *Wild*  
20 *Fish Conservancy v. Washington Dep’t of Fish & Wildlife*, 198 Wn.2d 846, 866, 502 P.3d  
21 359 (2022), citing *PT Air Watchers*, 179 Wn.2d 919, 926 (emphasis added). This standard  
22 is applied to the whole City review process, which includes the appeal hearing.

23 Supporting the position that the “entire record” includes the appeal is *Moss v. City of*  
24 *Bellingham*, 109 Wn. App. 6, 15, 31 P.3d 703 (2001). In that case the court found that a  
25 DNS had been issued prematurely before all SEPA mitigation measures had been imposed.  
The court still found no deficiency in SEPA review because all impacts had been thoroughly  
addressed during the SEPA review process:

...it is difficult to see how the appellants were prejudiced. ... the record indicates  
that the project received a considerable degree of scrutiny. ... While all of the  
required mitigation measures should have been imposed before the DNS was  
issued, the appellants still have not shown that the approved project, as it was  
mitigated, remains above the significance threshold.

*Moss*, 109 Wn. App. At 25.

In this case all impacts were evaluated and addressed by highly qualified professionals with  
stormwater, wetland, traffic and utility impacts subject to the added protection of third-party  
peer review. See Ex. C230, p. 16. No one could reasonably question the level of analysis  
for any of the impacts evaluated except for arguably the pre-hearing CARA analysis. As  
noted in COL No. 3, CARA compliance issues are likely beyond the scope of this review.

1 If CARA compliance is within the scope, the expert testimony of the Applicant's civil  
2 engineer, based upon the geotechnical report as outlined in Finding of Fact 7A, marginally  
3 meets the level of review required by the judicial standards above.

4 23. SEPA MDNS Upheld. The SEPA MDNS under appeal is upheld because it mitigates  
5 all probable significant adverse impacts as concluded in COL No. 21 and is based upon an  
6 adequate level of review as concluded in COL No. 22.

## 7 **RECOMMENDATION**

8 The PUD, Phase I preliminary plat application, and requested right of way reductions  
9 identified at page 43 of the staff report for the Avista Subdivision meets all applicable  
10 permit criteria as identified in the Conclusions of Law above and therefore should be  
11 approved subject to the following conditions<sup>17</sup> below. The SEPA appeal should be  
12 denied and the MDNS upheld for the reasons identified in the findings and conclusions  
13 above.

### 14 *GENERAL CONDITIONS*

- 15 1. Approval is granted for the Avista Planned Unit Development and Preliminary Plat  
16 for Phase One, the Sunrise Division, containing no more than 79 residential lots  
17 and 1.9 acres of neighborhood retail commercial. Revisions to the preliminary plat  
18 are permitted for plat design, roadway, and critical area modifications to allow  
19 conformity to the conditions of approval.
- 20 2. This application is subject to the applicable requirements contained in the Blaine  
21 Municipal Code, Public Works Design and Engineering Standards, and Building  
22 and Fire Codes. It is the responsibility of the Applicant to ensure compliance with  
23 the various provisions contained in these standards and codes.
- 24 3. SEPA mitigation measures, as identified in the project SEPA checklist and SEPA  
25 Mitigated Determination of Non-Significance (Exhibit C50), shall be reflected in  
the project design and civil construction plans, and are hereby made conditions of  
this approval. The SEPA MDNS may be modified, or a new SEPA review  
conducted, as a result of the SEPA appeal.
4. Critical Area protective measures, as identified in the Critical Area Determination  
conditions of approval (Exhibit C26) shall be reflected in the project design, civil  
construction plans, and revised preliminary plat, and are hereby made conditions of  
this approval. This includes the following:
  - a. The Applicant shall have the wetland flags surveyed by a professional  
licensed surveyor, and the survey showing the wetland boundaries and

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<sup>17</sup> Examiner revisions to staff recommended conditions are identified in track change.

- 1 buffers required by BMC 17.82.340 shall be submitted with any proposed  
2 development permit on the site.
- 3 5. All work shall be accomplished consistent with all other federal, state, or local  
4 statutes, ordinances, or regulations applicable to this project, and obtaining other  
5 required state and federal permit authorizations. These may include, but are not  
6 limited to: Joint Aquatics Resource Permit Application (JARPA) authorization,  
7 Forest Practices Permit (FPA), Hydraulic Project Approval (HPA), US Army Corps  
8 of Engineers Section 10 permit approval, and obtaining a Construction Stormwater  
9 General Permit (CSWGP) from the Department of Ecology, as necessary.
- 10 6. Responsibility for meeting other agency requirements shall be solely the  
11 Applicant's. The Applicant shall provide a copy of all state and federal required  
12 authorizations to the City of Blaine prior to the authorization of a land disturbance  
13 permit for any Avista site improvements. If no such permits are required from  
14 outside agencies, the Applicant shall provide the CDS Department with a letter  
15 stating such permits are not required prior to land disturbance permit issuance for  
16 each Phase.
- 17 7. Project activities shall comply with Inadvertent Discovery of Archaeological  
18 Resources and Inadvertent Discovery of Human Skeletal Remains on Non-Federal  
19 and Non-Tribal Land in the State of Washington (RCWs 68.50.645, 27.44.055, and  
20 68.60.055) policies and procedures. Specific inadvertent discovery language is  
21 included as a condition of approval in the SEPA MDNS issued for this proposal.

22 *PUBLIC WORKS CONDITIONS*

23 *WATER MAINS*

- 24 8. The proposed development shall include the installation of the water main  
25 extension, as shown on the preliminary design drawings with water service  
extended to each lot in the final plat.
9. The water system design shall conform to the City of Blaine's Development  
Guidelines and Public Works Standards, the City of Blaine Water System Plan, the  
Washington State Department of Health (DOH) requirements, the American Public  
Works Association (APWA) standards, the Washington State Department of  
Transportation (WSDOT) Standard Specifications for Road, Bridge, and Municipal  
Construction and the American Water Works Association Standard (AWWA)  
standards.
10. Pursuant to the City of Blaine's Development Guidelines and Public Works  
Standard, 4.09.000, all water system connections to serve buildings or properties  
with domestic potable water, fire sprinkler systems, or irrigation systems shall  
comply with the minimum backflow requirements as established by the Department  
of Health (DOH) and the City of Blaine.

*WATER SYSTEM*

11. If a water main extension is warranted, it will require a licensed Washington State  
Professional Engineer for plan design. Design shall conform to the Development

1 Guidelines, City of Blaine Water System Plan, Washington State Department of  
2 Health, and the American Water Works Association Standards.

3 12. Prior to final plat approval, provide a separate water service from the water main to  
4 the meter for each unit.

5 13. In designing and planning for any water system extension or connection, it is the  
6 developer's responsibility to determine that adequate water for both domestic use  
7 and fire protection is attainable. The developer must show, in the proposed civil  
8 plans, how water will be supplied and whether adequate water pressure will be  
9 attained in case of fire. An analysis of the system may be required at the discretion  
10 of the Public Works Director.

11 14. Adequate fire hydrant spacing will need to be determined. Hydrants shall be placed  
12 as per BMC 13.20.090, BMC 13.20.100 & BMC 13.20.110.

13 *SANITARY SEWER SYSTEM*

14 15. Prior to final plat approval, a sewage system shall be completed with service  
15 extended to each lot in the final plat. The sewage system is expected to include a  
16 combined lift station to serve the Inverness subdivision constructed by the  
17 developer under a City approved Public Facilities Construction Agreement or may  
18 be constructed by the City. The City and Applicant will enter into a reimbursement  
19 agreement (if constructed by the developer) or a cost-sharing agreement (if  
20 constructed by the City) in a form approved by the City related to a combined lift  
21 station that is consistent with the City's General Sewer Plan prepared by CH2M  
22 Hill, 2004, and the Capital Improvement Plan for Wastewater Utility, 2024. The  
23 reimbursement agreement will provide for reimbursement to the developer for built  
24 capacity that exceeds the capacity needs of the development and that is designed to  
25 serve an area beyond the development itself or, if the City constructs the combined  
lift station, the cost-sharing agreement will provide for payment from the developer  
in an amount proportional to the impact and requirements of the Project. At the sole  
discretion of the City, this mitigation measure may be satisfied by the Developer's  
construction of an alternative lift station that will serve only the development,  
provided however that this alternative would require amendment of the City's  
General Sewer Plan prepared by CH2M Hill, 2004, and the Capital Improvement  
Plan for Wastewater Utility, 2024. In any case, the lift station will be (i) constructed  
in accordance with City standards and a design approved by the City Public Works  
Director; (ii) subject to a City Public Facilities Construction Agreement; and (iii)  
subject to acceptance by the City Public Works Director upon completion. This  
condition is a mitigation measure in the MDNS, and will be incorporated as a  
condition approval for any approved preliminary plat for the Project, may be further  
refined as a condition of preliminary plat approval as needed to address probable  
impacts, and shall be read consistently with RCW 82.02.020.

16. The sanitary sewer system design shall conform to the City of Blaine's  
Development Guidelines and Public Works Standards, the City of Blaine  
Comprehensive Sanitary Sewer Plan, the requirements of the Washington State

1 Department of Ecology (DOE), and the Washington State Department of Health  
2 (DOH).

3 17. Prior to final approval, a separate side sewer stub shall be provided from the sewer  
4 main for each lot.

5 *ELECTRICAL SYSTEM*

6 18. City records indicate single-and three-phase electrical circuits located in  
7 Semiahmoo Parkway. The proposed development shall include the installation of  
8 the electrical circuit extension.

9 19. The electrical system, from design to completion, shall conform to Blaine  
10 Municipal Code (BMC) 13.16, Electricity.

11 20. Pursuant to BMC13.16.240, Public Works shall designate the type, size, and  
12 location of metering equipment; all meters and load-control devices shall be located  
13 on outside of buildings without obstruction.

14 21. Pursuant to BMC 13.16.270, any extension within the City limits shall be installed  
15 underground.

16 22. The specific dimensions and designs of approvable light poles shall be approved by  
17 the Public Works director prior to their installation, with the approved light pole  
18 designs included in the final PUD master plan.

19 *STORMWATER SYSTEM*

20 23. A Final Stormwater Design Report is required prior to issuing the land disturbance  
21 permit for subdivision improvements. The Final Stormwater Design Report and  
22 associated stormwater site plan must respond to all relevant conditions of the  
23 preliminary plat and PUD approval.

24 24. The stormwater system design for Phase One, the Sunrise Division, shall conform  
25 to the Washington State Department of Ecology’s Stormwater Management  
Manual for Western Washington (SWMMWW) 2019 version, the City of Blaine’s  
Development Guidelines and Public Works Standards, and the current Uniform  
Plumbing Code.

26 25. Applicant shall obtain after-the-fact design approval for existing constructed storm  
27 facilities, located northwest of the intersection of Selder and Bayvue Roads, by  
28 providing a copy of the approved design by GeoEngineers, or redesign and make  
29 improvements to bring the storm facilities into compliance with current standards  
30 at the time development affects these facilities. This would require the Applicant to  
31 include a preliminary design for each phase of the Project showing how storm  
32 facilities would be brought into compliance with the adopted Stormwater  
33 Management Manual for Western Washington, current edition. This condition does  
34 not apply to “Selder Pond” the historic drainage feature located generally northeast  
35 of the intersection of Selder Road and Bayvue Road so long as Selder Pond is not  
used as a stormwater facility serving the Avista Project.

26 26. All future preliminary plat applications shall include a preliminary stormwater  
27 design report, including hydrologic modeling demonstrating that wetland  
28 hydroperiods will be maintained to a degree as to have no significant adverse

1 impact to the wetlands function and values, consistent with the current adopted  
 2 edition of the Stormwater Management Manual for Western Washington for review  
 3 and approval by the City, as part of the preliminary plat application review process.  
 4 The stormwater design for Phase I shall be redesigned as necessary to prevent any  
 5 exceedances of the 120% limit on Wetland C hydroperiods as outlined in Section  
 6 6Ciii of this recommendation.

- 7 27. Prior to final plat approval, temporary and permanent storm water control shall be  
 8 provided in accordance with the applicable SWMMWW.
- 9 28. Each lot shall have a separate storm drain connection for conveyance. Runoff from  
 10 pollution-generating hard surfaces (PGHS) will be routed to approved stormwater  
 11 features . An alternative may be approved by the Public Works Director based on  
 12 an alternative plan determined to be consistent with the applicable SWMMWW.
- 13 29. All on-site storm drainage shall be privately owned and maintained.
- 14 30. Prior to commencing land disturbance activity, the Applicant shall submit a  
 15 Construction Stormwater Pollution Prevention Plan (SWPPP) to the City for review  
 16 and approval by the City. The final approved SWPPP shall demonstrate, in detail,  
 17 how Applicant will manage the site during the time that land disturbing activity is  
 18 taking place, including: measures to protect disturbed areas, control and direct  
 19 storm water runoff through construction areas, and provide water quality treatment  
 20 for runoff from the site. Best Management Practices (BMPs) associated with the  
 21 SWPPP shall comply with the current adopted edition of the Washington State  
 22 Department of Ecology’s Stormwater Management Manual for Western  
 23 Washington.

24 *TRANSPORTATION SYSTEM*

25 31. Private street cross-sections are proposed for the Avista subdivision interior that  
 deviate from the Public Works private road standards. The design for internal  
 streets, including non-motorized facilities, shall conform to the minimum design  
 requirements listed below:

Street Sections	Right-of-Way Width	Street Width
Entry Street A	70'	40' (w/median)
Entry Street B	70'	28'
Main Street	60'	28'
Minor Street	50'	28'
Lane	20'	20'

Rolled curbs on all private Avista streets except lanes; single-side sidewalks.

32. Except as noted in the private streets variations listed in condition #31, the  
 transportation system shall conform with Blaine Municipal Codes 17.60, 17.68, and  
 17.74 governing Long Subdivisions – Preliminary and Final Plats, Planned Unit

1 Developments (PUDs), and Subdivision Design Standards, and the City of Blaine  
2 Non-Motorized Transportation Plan.

3 33. All proposed onsite and offsite pedestrian facilities shall be ADA compliant to the  
4 minimum provisions of adopted accessibility standards.

5 34. Driveway intersections shall not have any visual obstructions within the sight  
6 distance triangle.

7 35. The Applicant shall consult with the Blaine School District to determine locations  
8 for school bus stops to serve the Avista development. Improvements shall provide  
9 safe walking conditions to the school bus stops as consistent with constitutional  
10 nexus and proportionality requirements. All school bus stops shall be included in  
11 the approved civil plans for each phase and constructed prior to final plat approval  
12 for that phase.

13 36. Two public access trails shall be developed through the Avista property as depicted  
14 in the Blaine Non-Motorized Plan: the Birch Point Trail leading from Semiahmoo  
15 Parkway to the UGA boundary (Birch Point Road) along the northwest boundary  
16 of the site, and the Cedar Grove Trail from a Whatcom County terminus with the  
17 Birch Point Trail leading to the existing Millennium Trail along Semiahmoo  
18 Parkway. A comparable alternative route may be approved by the CDS Director.

19 37. The public shall be granted a public trails easement across the Birch Point Trail,  
20 the Cedar Grove Trail, and any other public trail that transects the Avista property.  
21 Reference to the public trails easement shall be memorialized on the recorded plat.

22 38. The trail license restriction shall be removed from the Avista CC&Rs.

23 *PLANNING CONDITIONS*

24 39. The PUD approval shall be valid for eleven years from the day it is approved by  
25 the city council and shall only expire pursuant to BMC 17.68.210.

30 40. The 181-acre Avista PUD shall be designed such that each phase can stand alone  
31 so that if subsequent phases are not constructed, the completed portion of the  
32 project constitutes a coherent development logically interconnected with  
33 surrounding areas, and that certain project elements such as open space and  
34 recreational amenities be provided for each phase of development in rough  
35 proportion to the size of the particular phase within the whole project. In certain  
36 circumstances, infrastructure improvements shown for a later phase may be  
37 required to be constructed with an earlier phase, or appropriate securities provided  
38 to ensure that construction occurs even if the later phase never takes place.

39 41. The following are the only approved uses: Single family detached and attached  
40 housing; Multifamily housing; Age-in-place housing (Continuing Care Retirement  
41 Community) in the Sunburst Neighborhood; Neighborhood retail commercial  
42 (Phase 1 only); Homeowners Association maintenance and storage facility space  
43 (Homeowners Association member self-storage space).

44 42. A final revised master plan is required that fully depicts all phases of Avista in  
45 sufficient detail to clearly convey the intent of the developer across the entire 181-  
46 acre site as the guiding document for development of the overall site, individual

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- phases, architectural styles, building sites and structures, and public and private open space. The master plan shall clearly depict all usable open space.
- 43. The master plan shall specify all proposed amenities and locations across all five phases of development that provide at minimum 24 minor amenities and 12 major amenities and their proposed locations.
  - 44. The Master Plan shall include a detailed buildout schedule that meets the requirements of BMC 17.68.080.K.
  - 45. A revised master plan shall be submitted for review and approval by the CDS Director subsequent to PUD approval by the city council. Such submittal shall

1 occur within 180 calendar days of the issuance of the final decision. An extension  
is possible pursuant to BMC 17.68.090.

2 46. The revised master plan shall include:

- 3 • a minimum lot width of 50 feet, with no minimum lot width required for zero-lot-  
line attached dwellings.
- 4 • no use of ‘nominal’ in lot width designations.
- 5 • no discretionary variance authority.
- 6 • a single maximum impervious lot coverage percentage of 55% for all lots.
- 7 • Inclusion of architectural details for multi-family and commercial buildings.
- 8 • conceptual architectural renderings of single-family residences, and conceptual  
architectural renderings of greater detail for multiple-family residential, mixed-use  
and commercial structures required by BMC 17.68.050.B.1.d.

9 • Defined maximum height limits:

35 feet for single-family dwellings,

55 feet for multi-family buildings, four stories or fewer.

30 feet for neighborhood retail commercial (Sunrise Division, Phase One)

10 30 feet for Avista HOA maintenance and storage facilities and member self-storage  
(Suncrest Division, Phase X)

11 55 feet for Continuing Care Retirement Community (Sunburst Division)

12 • Defined setbacks:

Front Yards:

13 20-foot for structures

25-foot for attached garages.

14 Side Yards:

15 6-foot for all single-family dwellings, attached and detached (does not apply to  
common wall side)

16 16-foot for all multifamily.

Rear yards:

17 10-foot for all single-family dwellings, attached and detached

20-foot for all multifamily.

18 47. No more than 1.9 acres of neighborhood retail commercial uses are authorized in  
phase one.

19 48. The master plan shall be revised to reflect where neighborhood retail commercial  
20 uses not exceeding 10 acres in size would be permitted across the entire 181-acre  
PUD.

21 49. Subdivision design review of future phase preliminary plats is deferred to the time  
applications are submitted and reviewed for subsequent phases of this proposal.

22 50. A one-acre public park is proposed by the Applicant in the area near the northwest  
23 corner of the Avista development. A one-acre public park tract may be dedicated  
24 to the City near the northwest corner of the Avista development. Said public park  
shall provide a perimeter buffer and screening consistent with the SEPA MDNS  
25 conditions of approval. This public park may be counted as a major amenity for the  
Sunburst Division phase if developed, constructed and maintained by the

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Applicant. If the park is not constructed by the Applicant, it shall not be counted as a major amenity.

- 51. A detailed landscaping plan shall be submitted consistent with the requirements of BMC 17.126 prior to land disturbance permit issuance for subdivision site improvements, identifying the type, size, spacing and maintenance schedule for all landscaping proposed within the required buffer areas and the overall site.
- 52. The landscape plan shall include denser screening along the frontage of Semiahmoo Parkway consistent with the SEPA determination, and naturalized groupings of three to five trees together with native and ornamental shrubs along all internal roadways.
- 53. To retain and protect trees with a high retention value to the maximum extent possible, the Applicant shall retain a certified arborist or similarly qualified professional to inventory and retain significant trees (evergreen or deciduous, six inches in diameter or greater, measured four feet above existing grade) within the designated perimeter buffers.
- 54. A defined lot coverage amount shall be established for all residential lots in the final PUD Master Plan as adopted by City Council.
- 55. Architectural review of all building plans shall be the responsibility of the HOA/Declarant.
- 56. Required residential parking shall be provided on the lot they intend to serve, consisting of a parking strip, driveway, garage, or combination.
- 57. The preliminary Covenants, Conditions and Restrictions shall be revised for consistency with the final decision, and provide further detail on architectural controls prior to and after the formation of the HOA, and incorporate a landscape and lighting plan. The final CC&R's shall be reviewed and approved by the City prior to recordation.
- 58. Maintenance responsibilities for PUD buffer tract landscaping shall be clearly identified in the final CC&Rs.
- 59. Maintenance of any trail corridors or improvements retained in private ownership shall be the responsibility of the Homeowner's Association. A provision for the maintenance of the trail corridor and other improvements retained by the HOA must be provided in the covenants of the development and referenced on the face of the final recorded plat.
- 60. All private sidewalks, walkways, curbs, gutters, stormwater drainage facilities, utilities, and all other common areas and open space areas shall be conveyed to an owner's association within 120 days after recording the final subdivision plat.
- 61. The owner's association shall be empowered to collect dues and assessments and to enforce covenants, conditions, and restrictions and any rules and regulations deemed necessary for the governing of development and use of each lot and common areas within the PUD.
- 62. The final plat documents shall reference any restrictive covenants regarding private streets and shall include an acknowledgment statement indicating city policy to

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- refuse consideration of private streets for dedication unless and until said private streets are improved to meet current minimum city standards.
63. Prior to final plat approval the wetlands and their buffers shall be placed in Native Growth Protection Areas with applicable development limitations stated on the face of the final recorded plat. Native Growth Protection Area signage shall be installed consistent with the BMC 17.82.280.
64. All PUD buffer restrictions shall be clearly noted on the final plat or other legal document to advise potential lot purchasers/residents of said buffer restrictions.
65. The Applicant is responsible for payment of applicable park, traffic, and fire impact fees at the time of building permit issuance to help pay for new or expanded public facilities that will directly address the increased demand for services created by that development.
66. A homeowner’s association shall be created prior to final plat approval. Prior to final plat approval, preliminary by-laws shall be submitted to the City of Blaine CDS department for review and approval as consistent with BMC 17.68.170.
67. The Applicant shall prepare and acquire staff approval of a safe school walking conditions report consistent with RCW 58.17.110(2)(a) prior to final plat approval. The Applicant shall consult with the Blaine School District to determine locations for school bus stops to serve the Avista development. To the extent proportionate to project impacts, the Applicant shall install improvements as necessary to assure safe walking conditions to the school bus stops. All school bus stops shall be included in the approved civil plans for each phase and constructed prior to final plat approval for that phase.
68. The Avista Project shall be designed to provide an additional open space buffer, ranging from 0-20 feet, around all wetlands outlined in the approved Critical Areas Wetland Delineation and Wildlife Assessment report between the wetland buffer and lots as depicted in Sheet 15 of Exhibit C7 as further illustrated by the green highlighting in attached Figure 1, which provides additional open space buffer of 1.14 acres to protect the wetlands. The buffer shall remain unfenced with the exception of wetland and stormwater facility protective fencing. Trails, directional signage and below-grade stormwater facilities may be permitted in the conservation easement. A conservation easement for this additional open space consistent with this condition , shall be memorialized on the face of the plat, and future plats. The final conservation easement language and buffer shall be reviewed by the Critical Areas Administrator prior to approval of construction plans for each Phase.
69. The Avista Project shall maintain a 20-foot PUD buffer and an 80-foot Neighborhood buffer, for a combined 100-foot buffer from Semiahmoo Parkway. The buffer may be enhanced based on the final landscape plan and consistent with the SEPA determination.

*PRELIMINARY PLAT CONDITIONS*

1 70. Revise the preliminary plat and PUD plans to reflect the conditions of approval that  
2 require a physical change to the plans. Call the CDS Director if there are questions  
3 about these revisions.

4 71. The Applicant shall submit a revised preliminary plat that is consistent with all  
5 applicable conditions of this approval to the Community Development Services  
6 Department. The revised preliminary plat shall be submitted to the CDS director  
7 for review of compliance with the approved development, as conditioned.

8 72. A survey prepared by a licensed surveyor showing the precise, delineated wetland  
9 boundaries of all wetlands identified in the critical area report and their required  
10 buffers shall be submitted as a supplemental plan sheet in the revised preliminary  
11 plat plan set.

12 (covered by Condition 26)

### 13 CIVIL INFRASTRUCTURE/LAND DISTURBANCE CONDITIONS

14 Prior to issuance of a permit authorizing construction of civil infrastructure the  
15 following is required:

16 73. A complete set of civil engineering plans for the development shall be prepared by  
17 a licensed Washington State Professional Engineer and submitted for all required  
18 publicly served utilities (i.e., sewer, water, storm water, & power), streets and  
19 sidewalks rights-of-way and easements, and any required analysis and reports for  
20 the site, with a Land Disturbance Permit Application and approved prior to start of  
21 any construction activity. Submittals shall include a comprehensive stormwater  
22 management plan and an erosion and sediment control plan.

23 74. Design will conform to the City of Blaine Public Works Development Guidelines,  
24 City of Blaine Comprehensive Plan, City Traffic improvement Plan, City of Blaine  
25 Water System Plan, Washington State department of Health, American Water  
Works Associations Standards, Western Washington Stormwater Management  
Manual, and all other related governing design and standards documents, unless  
deviations are approved as part the Project decision. This is not an exhaustive list.  
It is the responsibility of the Applicant to ensure compliance with the various  
provisions contained in these standards and codes.

75. (Combined with Condition 67) Conditions identified through the submittal and  
review of civil engineering plans may warrant revisions or modifications to the  
utility plan reviewed during the long subdivision process.

76. A Public Facilities Construction Agreement (PFCA) will be required for any  
proponent-constructed public facility improvements.

77. Any work or obstructions within the City's right-of-way will require a Right-of-  
Way Excavation Permit and/or an Obstruction Permit from the City. The Applicant  
is responsible for coordinating permits with all other agencies. The Applicant shall  
post a performance bond for any work in the City right-of-way and/or on City  
utilities and infrastructure to the satisfaction of the Public Works Director prior to  
issuance of permit(s) for said work. Once the project is accepted, the bond will be

1 transitioned to a maintenance bond for the duration of the two-year maintenance  
2 period.

3 78. Existing utility information shall be field verified by Applicant's contractors.

4 79. Applicant is responsible for sizing all their utilities to meet the needs of their  
5 development.

6 80. Approval of a Land Disturbance Permit Application with a comprehensive  
7 stormwater management plan and an erosion and sediment control plan is required  
8 prior to any construction activity.

9 81. Limits of clearing shall be depicted and are limited to the buildable area within the  
10 respective phase, together with any areas determined by the City to be needed for  
11 staging, construction or access to each phase.

12 82. All easements and rights of way shall be dedicated prior to, or concurrent with,  
13 recording a Final Plat.

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FINAL PLAT APPROVAL AND IMPACT FEES CONDITIONS

Prior to recording of the phase one final plat, the following is required:

83. The final plat shall be consistent with all applicable conditions of approval in this  
decision.

84. Provide confirmation of the formation and recordation of the Avista Homeowner's  
Association.

85. Confirm the recordation of the public trails access easement.

86. Include reference to the public trails easement on the final plat.

87. Dedicate a one-acre community park consistent with Condition 50, near the  
northwest corner of the Avista site, to the public and depict its location consistent  
with the PUD buffer and landscape requirements. An alternative ownership and  
maintenance plan may be approved by the CDS Director.

88. All private streets, sidewalks, walkways, curbs, gutters, stormwater drainage  
facilities, utilities, and all other common areas and open space areas shall be  
conveyed to the owner's association.

89. Submit revised Covenants, Conditions and Restrictions (CC&Rs) for review and  
approval by the City consistent with BMC 17.68.080.I, .160.E, .170 and .180.

90. Submit final plat application materials consistent with BMC 17.60.210.

91. Submit as-built drawings consistent with BMC 17.60.270.

92. The Applicant shall post a maintenance bond for any public infrastructure to the  
satisfaction of the Public Works Director prior to acceptance of public  
infrastructure by the City.

93. Impact fees (parks, traffic, and fire) required under Chapter 3.80 shall be paid for  
each lot at the time of Building Permit issuance. SEPA Mitigation Fees required  
under SEPA Mitigation Measure 6 established in Exhibit C50 shall be paid pursuant

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to the Voluntary Mitigation Agreement referenced in Exhibit C232, Exhibit A. A note to this effect shall be shown on the face of the Final Plat.

Examiner Added conditions

- 94. No proposed trail may cross into any regulated wetland absent a code authorized waiver. No final civil drawings showing wetland trail crossings shall be approved unless authorized by code.
  
- 95. The light pole and sidewalk deviation requests identified in Conclusion of Law No. 6 above shall be separately approved as authorized by City code. These separate authorization process to the extent applicable are anticipated to include the approval by public works and the community development director as authorized for some deviations by the introductory language to BMC 17.74.080, or through the deviations authorized by the City's public works standards.

Dated this 5<sup>th</sup> day of January 2026.

Phil Olbrechts  
Hearing Examiner  
City of Blaine



1 The four lots will range from 5.02 acres to 5.68 acres. The applicant is proposing to  
2 set aside 16.94 acres across the six lots as various permanent open spaces, which  
3 consists of Primary Conservation Areas, Secondary Conservation Areas, Designated  
4 Open Space, and Active Recreation Areas (see Exhibit 3). The proposal would allow  
5 each lot to have access to E Brockdale Rd via the proposed access road. There is an  
6 existing easement connecting the site to E Brockdale Rd, as shown on the Performance  
7 Subdivision Diagram (Exhibit 4). The proposed access road traverses up the hillside  
8 (Primary Conservation Area) in the southern portion of the site. The developable  
9 portions of the lots are on a plateau, but are not visible from E Brockdale Rd. The part  
10 of the site with the highest elevation has been set aside as Designated Open Space, so  
11 no future development would occur on a hilltop.

12 The southern boundary of the site includes a ravine and a un-typed (non-regulatory)  
13 watercourse. This means the site is visible (up-hill) from E Brockdale Rd. However,  
14 the vegetation on the banks of the ravine, as well as the angle of the slope, create a  
15 visual buffer between the road and the interior of the site (see Exhibit 7). The western,  
16 northern, and eastern boundaries of the site also include dense vegetation and stands of  
17 trees which creates a visual buffer between the interior of the site and the adjacent  
18 properties (see Exhibit 7). Aside from the slopes on the southern portion of the site and  
19 a ridge which cuts through the northern portion of the site, the rest of the site is very  
20 flat.

21 The site is undeveloped. A majority of the site was logged between 2006 and 2009, so  
22 much of the site consists of medium sized trees, shrubs, and invasive vegetation (i.e.,  
23 scotch broom, bull thistle, etc.). No rare or important site features were observed on the  
24 site by County staff. However, the permanent open space designated by this project  
25 preserves much of the existing mature trees, which likely provide habitat (seen Exhibit  
4).

4. Characteristics of Area. South and east of the property, there are single-  
family residential properties ranging between 1 and 20 acres. North of the property are  
lots with the potential for single-family residences that are all over 10 acres. East of the  
property is forestland owned by Hunter Farms. None of the adjacent parcels have  
designated open space.

5. Open Space. The project will provide adequate primary and secondary  
conservation areas as well as designated active and passive open spaces.

A. Primary Conservation Areas. Primary conservation areas are wetlands, water  
bodies, floodway, slopes of 25% or greater and any area defined as a critical  
area. The definition of critical areas includes landslide hazard areas, also known  
as geologically hazardous areas (MCC 8.52.030). Geologically hazardous areas  
are those with slopes greater than 15% that also contain hillsides intersecting  
geological contacts and springs or groundwater seepage or any slope of 40% or  
greater with a vertical relief of 10 or more feet (except for areas of consolidated  
rock) (MCC 8.52.140(1)(A)(v) and (vi)).

1 As shown on the Draft Survey (Exhibit 3), the Primary Conservation Area is  
2 2.17 acres. Subtracting the Primary Conservation Area from the 31.70-acre site  
3 leaves a net buildable area of 29.53 acres.

4 B. Secondary Conservation Areas. The project will provide adequate secondary  
5 conservation areas and designated open space including active recreational  
6 space.

7 i. Mandatory Secondary Conservation Areas. Secondary conservation  
8 areas are the upland buffers around critical areas, prime agricultural  
9 land, natural meadows, slopes of 15% or greater (without the greater  
10 specificity of MCC 8.52.140(1)(A)(v)), ridge lines, areas abutting  
11 designated open space, flood plains and sites of historic, cultural or  
12 archeological significance.

13 The proposal includes 1.74 acres of Secondary Conservation Area,  
14 which is the upper ridgeline from elevation 320 down to elevation 305  
15 with an additional building setback of 15 feet.

16 ii. Total Required Open Space. Performance subdivisions are required to  
17 provide open space equal to 50% of the net buildable area. After  
18 subtracting the Primary Conservation Area, the net buildable area of the  
19 site is 29.53 acres, which is noted on the Draft Survey (Exhibit 3).  
20 Consequently at least 14.765 acres must be set aside as open space.  
21 Including the 1.74 acres of Secondary Conservation Area, the proposal  
22 has 14.77 acres set aside as permanent open space.

23 iii. Active Recreational Space. The Applicant is required to demonstrate  
24 that 25% of the minimum required open space is suitable for active  
25 recreational open space. 25% of the required 14.765 of open space is  
3.69 acres. 3.69 acres is designated as “Active Recreation Area,” as  
shown on the Draft Survey (Exhibit 3). The northern boundary of the  
Active Recreation Area is approximately 110 feet south of where any  
structures could be located on Lots 2, 3, and 4, which would provide  
sufficient separation between the residents of the lots and anyone using  
the Active Recreation Area. The Active Recreation Area is bounded by  
the proposed access road to the west, the top of slope to the south, and  
the neighboring property to the east. The Photos of Existing Site  
(Exhibit 7, Pages 9 - 10) includes photos taken in the Active Recreation  
Area. Since the site was logged between 2006 and 2009, the Active  
Recreation Area does not have dense, woody vegetation. It is currently  
comprised of young trees, shrubs, and invasives. The Active Recreation  
Area is accessible to residents of Lots 1, 5, and 6 via the proposed access  
road.

- 1           iv.    Scenic Views and Vistas. The Photos of Existing Site (Exhibit 7) show  
2           that the addition of residences shouldn't interrupt scenic views or vistas.  
3           The applicant has dedicated the area north of the ridge line as  
4           Designation Open Space (see Exhibit 3). Since the slopes of the ridge  
5           line and everything uphill from that are dedicated as permanent open  
6           space, no structures will interrupt scenic views or vistas.

## CONCLUSIONS OF LAW

### Procedural:

- 7           1.       Authority of Hearing Examiner. MCC 16.21.020 provides that the hearing  
8           examiner will review and approve the preliminary sketch for a performance  
9           subdivision.

### Substantive:

- 10          2.       Zoning Designation. The property is zoned Rural Residential 10.  
11  
12          3.       Review Criteria and Application. Any applicant for subdivision approval  
13           (or short subdivision approval, see MMC 16.08.135) who seeks an increase in  
14           authorized density must first submit an application for performance subdivision review  
15           to establish whether the proposed subdivision qualifies for increased density under  
16           Chapter 16.21 MCC. In the RR-10 zone the maximum density absent a performance  
17           subdivision is 1 du/10 acres with a minimum lot size of 20,000 square feet. *See* MCC  
18           17.04.233(a). The Applicants seek to increase the authorized density from 1 du/10 acres  
19           to 1 du/5 acres, a 100% increase in density. The provisions in Chapter 16.21 MCC  
20           necessary to acquire this density bonus are quoted below in italics and applied through  
21           corresponding conclusions of law.

22          **MCC 16.21.035:** *No lot for which the construction of a residential dwelling is  
23           proposed shall be less than twenty thousand square feet in gross land area.*

- 24          4.       Criterion met. The smallest proposed lot is 5.02 acres in size.

25          **MCC 16.21.040:** *Primary conservation areas. Primary conservation areas shall be  
clearly identified, and shall be set aside as permanent open space. Primary  
conservation areas shall be included in the calculation of both standard and maximum  
density allowed, but they shall not be used in calculating the percentage of permanent  
open space required.*

4.       Criterion met. This criterion is satisfied. The Applicants have identified a  
2.17-acre primary conservation area which will be set aside as permanent open space.

1 As described in Finding of Fact No. 5A, the net buildable area less the primary  
2 conservation area is 29.53 acres.

3 **MCC 16.21.050:** *Secondary conservation areas shall be identified and shall, to the*  
4 *greatest extent possible, be avoided as development areas. The minimum threshold for*  
5 *qualification as a performance subdivision is that at least fifty percent of the buildable*  
6 *area of the property be set aside as permanent open space. Buildable area excludes*  
7 *primary conservation areas, but includes secondary conservation areas. At least*  
8 *twenty-five percent of the minimum required open space shall be suitable for active*  
9 *recreation purposes, but no more than fifty percent shall be utilized for that purpose,*  
10 *in order to preserve a reasonable proportion of natural areas on the site. Upon*  
11 *reaching this threshold, the Applicant shall be entitled to a density bonus equal to fifty*  
12 *percent of the difference between the standard residential density and the maximum*  
13 *residential density allowed within the particular development area.*

14 5. Criterion met and 50% density bonus authorized. As described in Finding  
15 of Fact No. 5B, the Applicant has provided for secondary conservation areas. As  
16 determined in Finding of Fact No. 5B, the proposal provides for 50% total open space  
17 as required and 25% of that open space is designated for active recreational use

18 **MCC 16.21.060:** *Additional open space criteria. The design of an open space area*  
19 *should encourage the following:*

20 6. Criterion met and 25% density bonus authorized. As discussed in  
21 Conclusions of Law 7-11, all the criteria of MCC 16.21.060 are met.

22 **MCC 16.21.060(a):** *Interconnection with designated open space on abutting*  
23 *properties;*

24 7. Criterion met. None of the adjacent parcels have designated open space.  
25 However, since the proposal is bounded by Designated Open Space on all four sides  
(see Exhibit 3), if there were ever to be any dedicated open space on any adjacent  
parcels, the open space would likely be contiguous and interconnected.

**MCC 16.21.060(b):** *The preservation of important site features, such as rare or*  
*unusual stands of trees, unique geological features, or important wildlife habitat;*

8. Criterion met. No rare or important site features were observed on the site  
by County staff. However, the permanent open space designated by this project  
preserves much of the existing mature trees, which likely provide habitat (seen Exhibit  
4).

**MCC 16.21.060(c):** *Direct access from as many lots as possible within the*  
*development;*

1 9. Criterion met. All resulting lots have direct access to the Designated Open  
2 Spaces of this proposal, as shown on the Draft Survey (Exhibit 3). Lots 1, 5, and 6 will  
3 be able to access the Active Recreation Area via the proposed access road.

4 **MCC 16.21.060(d):** *Minimizing the fragmentation of the open space areas. To the  
5 greatest extent possible, the designated open space should be located in large,  
6 undivided areas;*

7 10. Criterion met. The designated open spaces are undivided to the greatest  
8 extent possible. There is one area where there is a break in the contiguous open space,  
9 which can be seen on the Performance Subdivision Diagram (Exhibit 4). The break is  
10 to accommodate the access easement. On the western boundary of the proposal, the  
11 Designated Open Space thins down to 50 feet wide. On the eastern boundary of the  
12 proposal, the Designated Open Space thins down to 25-feet wide. Other than those  
13 thinner areas, the open spaces is in large, undivided areas.

14 **MCC 16.21.060(e):** *A curvilinear roadway design which minimizes the visual impact  
15 of houses as may be seen from the exterior of the site.*

16 11. Criterion met. The internal road for the lots is partially curvilinear. Due  
17 to the slope in the southern portion of the site, combined with the dedicated open space,  
18 the sightlines are such that the future residences on all lots will not be viewable from E  
19 Brockdale Rd. This can be seen in the Photos of Existing Site (Exhibit 7, Pages 1 - 3).

20 **MCC 16.21.070:** *Site design standards. The siting of house lots should avoid the  
21 following:*

- 22 a. *Interruption of scenic views and vistas;*  
23 b. *Construction on hill tops or ridge lines;*  
24 c. *Direct access or frontage on existing public ways;*  
25 d. *A "linear" configuration of open space (except when following a linear site  
feature, such as a river, creek or stream).*

*Compliance with the provisions set forth in this section shall entitle the Applicant to a  
residential density bonus equal to twenty-five percent of the difference between the  
standard residential density and the maximum residential density allowed within the  
particular development area.*

12. Criterion met and 25% density bonus authorized.

The Photos of Existing Site (Exhibit 7) show that the addition of residences shouldn't  
interrupt scenic views or vistas. Per Conditions # 2 and 3 of the Findings of Fact,  
Conclusions of Law and Final Decision (Exhibit 2), the applicant has dedicated the area  
north of the ridge line as Designation Open Space (see Exhibit 3). Since the slopes of  
the ridge line and everything uphill from that are dedicated as permanent open space,  
no structures will interrupt scenic views or vistas.

1 The developable areas of the lots are mostly flat, and while the entirety of the site is on  
2 a hill, the vegetation on the perimeter of the site will be preserved as dedicated open  
3 space. This can be seen in the Photos of Existing Site (Exhibit 7). Per Conditions # 2  
4 and 3 of the Findings of Fact, Conclusions of Law and Final Decision (Exhibit 2), the  
5 applicant has dedicated the area north of the ridge line as Designation Open Space (see  
6 Exhibit 4). Thus, no construction on hill tops or ridge line will occur due to this  
7 proposal.

8 All lots are accessed through an easement over tax parcel 42126-41-00000, so not lots  
9 within this proposal will have direct access or frontage on an existing public way.

10 The design of the open space is largely non-linear. As seen on the Draft Survey (Exhibit  
11 3), the dedicated open space completely bounds the parcel along its western, northern,  
12 and eastern boundaries, with the only break being for the access road through the  
13 southern boundary. Areas of the open space that are seemingly “linear” occur to protect  
14 areas within 300 feet of slopes greater than 40% or to create a buffer around the  
15 perimeter of the site.

16 **MCC 16.21.090** : *The applicant shall provide a mechanism to assure that any required  
17 open space is permanently protected and maintained.*

18 13. Criterion met. Restrictions for protecting and maintaining the open space  
19 will be recorded on the face of the survey.

20 **MCC 16.21.100** : *(a) The open space may be conveyed by fee simple instrument to an  
21 owner's association, to the county (subject to county approval), or to an entity (for  
22 example, a land trust) acceptable to the county who has demonstrated capacity to  
23 provide for the long-term protection and maintenance of the property. (b) The open  
24 space may be kept by the Applicant, and used for any of the purposes set forth in Section  
25 16.21.120.*

14. Criterion met. The open space will be kept by the applicant and future  
property owners as of now. The applicant has been made aware of the use restrictions  
in MCC 16.21.120.

**MCC 16.21.110**: *Any conveyance of the required open space shall include an  
endowment of funds equal to at least twenty times the annual estimated maintenance  
cost, in order to assure that the property will be maintained. The requirement for an  
endowment may be waived upon conveyance to an owner's association, provided that  
the bylaws of such association shall require regular payments from members to defray  
maintenance costs. The bylaws shall also include provisions for the recovery of funds  
in the event of default.*

15. Criterion met. No common amenities or infrastructure are being proposed or are required for the open space area. Therefore, the endowment requirement of this section should be waived.

**MCC 16.21.120:** (a) *The primary uses of open space set aside pursuant to this section are active and passive recreation, protection and preservation of critical areas, and preservation of other natural elements of importance to the community, and to the residents of the development. Other uses permitted within open space areas are forestry and agriculture, provided that these uses do not occur within any required buffer yard.* (b) *Open space set aside pursuant to this chapter may be designated by the Applicant as "future development area." Such designated area shall be kept and maintained as open space, until such time as the land may be designated for development at urban densities. At any time after such change in land use designation occurs, the "future development area" land may be developed in accordance with the regulations in effect at that time. Such development shall require a new, separate application. Primary resource areas and buffer yards shall not be designated as "future development areas."*

16. Criterion met. The open space set aside by the Applicants are dedicated to critical areas and active recreation, which is consistent with the uses authorized above.

**Additional Review Criteria**

**MMC 15.09.050 Type III review**

*(1) The development does not conflict with the comprehensive plan and meets the requirements and intent of the Mason County Code, especially Titles 6, 8, and 16.*

17. Criterion met. The proposal is consistent with the Mason County Comprehensive Plan in that it allows single family development in an unincorporated area while preserving rural character. The proposal is located on property that is zoned as Rural Residential 10 and the Applicant has so far complied with the requirement for a preliminary performance subdivision review under Title 16 Subdivisions of the Mason County Code. At this point in the process, application of Title 6--Sanitation does not apply. A Determination of Non-Significance (DNS) was issued on February 13, 2025 (Exhibit 5). The SEPA comment period ended on February 27, 2025. Three comments were received (Exhibit 5).

*(2) The development does not impact the public health, safety and welfare and is in the public interest.*

18. Criterion met. The preliminary sketch of the proposed performance subdivision meets the criteria for conservation areas and open space. From the standpoint of density and open space, which is the only focus of performance subdivision review, the project has no adverse impacts on public health, safety and welfare and is in the public interest by creating open space and preserving rural character.

1 (3) *The development does not lower the level of service of transportation and/or*  
2 *neighborhood park facilities below the minimum standards established within the*  
3 *comprehensive plan. If the development results in a level of service lower than those*  
4 *set forth in the comprehensive plan, the development may be approved if improvements*  
5 *or strategies to raise the level of service above the minimum standard are made*  
6 *concurrent with the development. For the purpose of this section, “concurrent with the*  
*development” is defined as the required improvements or strategies in place at the time*  
*of occupancy, or a financial commitment is in place to complete the improvements or*  
*strategies within six years of approval of the development.*

7 19. Criterion met. Adequacy of roads and parks will be addressed during later  
8 the later stages of subdivision review.

9 **DECISION**

10 The Applicants are entitled to a 100% density bonus MCC 16.21.050 (50%), MCC  
11 16.21.060 (25%) and MCC 16.21.070 (25%). The Applicant’s request for three  
12 additional lots as configured in Ex. 3 is approved.

13 Dated this 26<sup>th</sup> day of December 2025.

14 

15 Phil A. Olbrechts  
16 Mason County Hearing Examiner

17 **Appeal Right and Valuation Notices**

18 This land use decision is final and subject to appeal to superior court as governed by  
19 Chapter 36.70C RCW. Appeal deadlines are short, and procedures strictly construed.  
20 Anyone wishing to file a judicial appeal of this decision should consult with an attorney  
21 to ensure that all procedural requirements are satisfied.

22 Affected property owners may request a change in valuation for property tax purposes  
23 notwithstanding any program of revaluation.  
24  
25

# City of Kenmore, Washington

## Hearing Examiner Rules

### 1. EXPEDITIOUS PROCEEDINGS

The Hearing Examiner and all parties shall make every reasonable effort to avoid delay at each stage of every proceeding consistent with fairness to all parties.

### 2. COMPUTATION OF TIME

(a) In computing any period of time prescribed or allowed by these Rules of Procedure (“Rules”), the day of the act, event, or default from which the designated period of time begins to run shall not be included.

(b) The last day of the period so computed shall be included, terminating at 5:00 p.m., unless the last day of the period is a Saturday, Sunday or legal holiday as defined in RCW 1.16.050, in which event the period shall run until 5:00 p.m. of the next day which is not a Saturday, Sunday or legal holiday.

(c) When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays or legal holidays shall be excluded from the computation.

(d) “Working” days as referenced in these Rules exclude weekends and legal holidays.

### 3. DEFINITIONS

(a) “Code” or “KMC” means the Kenmore Municipal Code.

(b) “Council” means the Kenmore City Council.

(c) “Examiner” or “Hearing Examiner” means the City of Kenmore Hearing Examiner.

(d) “Interested Person” means any individual, partnership, corporation, association, or public or private organization of any character significantly affected by a proceeding before the Hearing Examiner or identified by the ordinance or Code under which the proceeding is brought as having a right to participate.

(e) “Party” means:

(1) For an open record hearing on a permit application:

- (i) the applicant;
- (ii) the City;

(iii) a person who testifies at the hearing or who submits written testimony for consideration at the hearing; and

(2) For any open record appeal of an administrative decision:

(i) the applicant;

(ii) the appellant;

(iii) the City; and

(iv) any intervenors allowed by the hearing examiner to join as a party.

#### **4. QUALIFICATIONS, DUTIES AND JURISDICTION OF THE HEARING EXAMINER**

(a) Hearing Examiner Qualifications: Hearings shall be presided over by a duly qualified Hearing Examiner or deputy Hearing Examiner appointed/contracted by the City Council.

(b) Hearing Examiner Duties: The Hearing Examiner shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. The Hearing Examiner shall have all powers necessary to that end, including the following:

(1) To administer oaths and affirmations;

(2) To issue subpoenas to compel witnesses to appear at the hearing;

(3) To rule upon offers of proof and to admit evidence;

(4) To regulate the course of the hearings and the conduct of the participants;

(5) To consider and rule upon procedural and other motions appropriate to the proceedings;

(6) To make and file orders, recommendations and decisions; and

(7) To hold prehearing or other conferences.

(c) Hearing Examiner Jurisdiction: The Hearing Examiner shall have the authority to conduct hearings, prepare a record, enter written findings and conclusions, and issue decisions or recommendations for any matter or appeal for which the KMC, other ordinance, or the City Council designates the Hearing Examiner to be the Hearing Body.

On appeals, the Hearing Examiner shall have the authority to vacate, affirm or modify the underlying appealed from decision.

(d) Hearing Examiner Independence: In the performance of these duties, the Hearing Examiner shall not be responsible to, or subject to the supervision or direction of, any elected official or any officer, employee or agent of any municipal department.

(e) Disqualification:

(1) The Examiner on his or her own initiative may enter an order of disqualification in the event of personal bias or prejudice, or to preserve the appearance of fairness.

(2) A party may file a declaration (a statement in writing and under penalty of perjury) stating facts supporting the belief that such party cannot have a fair and impartial hearing by reason of the personal bias, prejudice, or appearance of unfairness of the Hearing Examiner.

The declaration shall be filed not less than ten (10) working days before the hearing unless good cause is shown, and in any case before the Hearing Examiner makes any discretionary ruling; provided a declaration seeking disqualification on appearance of fairness grounds may be filed at any time, but must be filed promptly after the basis for disqualification is known or should have been known to the party seeking such disqualification.

The Hearing Examiner shall rule on the declaration prior to making any other ruling and prior to proceeding with the hearing.

## **5. EX PARTE COMMUNICATION**

(a) For purposes of this rule, "ex parte communication" means a written or oral communication concerning the pending matter with the Hearing Examiner outside of a public hearing and not included in the public record.

(b) Pursuant to Chapter 42.36 RCW, as is currently exists or is hereby amended, no interested person (nor his/her agent, employee or representative) shall communicate ex parte directly or indirectly with the Hearing Examiner concerning the merits or facts of any matter being heard before the Hearing Examiner, or any factually related matter. This rule shall not prohibit ex parte communications about schedules and other procedural topics.

(c) The Hearing Examiner shall not communicate ex parte directly or indirectly with any interested person (nor his/her agent, employee or representative) regarding the merits or facts of any matter being heard before the Hearing Examiner except about procedural topics as identified above.

(d) If a substantial, prohibited ex parte communication is made to or by the Hearing Examiner, such communication shall be publicly disclosed at the next following and each

succeeding public hearing regarding the pending matter or, if there is no further such hearing, disclosure shall be made in writing to all parties of record within five (5) working days of the date of the improper communication. Parties shall have the opportunity to make objections to the ex parte communication within ten (10) working days of such disclosure.

## **6. RIGHTS OF A PARTY**

Every party in any proceeding before the Hearing Examiner shall have a right to the following:

- (a) Due notice.
- (b) Presentation of evidence.
- (c) Objection.
- (d) Motion.
- (e) Argument.
- (h) Any other rights essential to a fair hearing.

## **7. PREHEARING AND OTHER CONFERENCES**

(a) The Examiner may, on his or her own order, or at the request of a party, hold a conference prior to the hearing to consider:

- (1) Identification, clarification, and simplification of the issues;
- (2) Disclosure of witnesses to be called and exhibits to be presented;
- (3) Motions;
- (4) Other matters deemed by the Hearing Examiner appropriate for the orderly and expeditious disposition of the proceedings.

(b) Prehearing conferences may be held by telephone conference call.

(d) All parties shall be represented at any prehearing conference unless they waive the right to be present or represented, and are granted permission by the Hearing Examiner not to attend.

(e) Following the prehearing conference, the Hearing Examiner may issue an order reciting the actions taken or ruling on motions made at the conference. The prehearing order shall supersede any conflicting Hearing Examiner Rules.

## **8. APPEALS BEFORE THE HEARING EXAMINER**

- (a) Filing Requirements for Filing of the Appeal

Fee and content requirements are set by Code. Any applicable Code deadlines for filing an appeal or serving the appeal at specified places or upon specified persons shall be considered jurisdictional. The failure of a party to comply with a jurisdictional requirement shall be grounds for dismissal of the appeal upon motion by a party or sua sponte by the examiner at any time prior to the issuance of a final decision.

(d) Clarification of the Appeal Statement

If the Hearing Examiner determines that the appeal is vague or ambiguous or does not sufficiently set forth the exceptions and objections with regard to the appealed matter, the Hearing Examiner may require that the appellant amend the appeal.

Within ten (10) calendar days of notice to amend, or a shorter time period as found to be equitable by the Hearing Examiner, the appellant shall file a written clarification of the appeal as required by the Hearing Examiner. If the appeal is not amended by 5:00 p.m. of the last day of that time period, it shall be dismissed by the Hearing Examiner.

(e) Dismissal of Appeals

The Hearing Examiner shall dismiss an appeal without hearing when it is determined by the Hearing Examiner without merit on its face, frivolous, or brought merely to secure a delay.

(f) Parties to the Appeal

The parties to the appeal are the City, appellant(s) and the applicant. If multiple appellants or a group of appellants file an identical appeal, the Hearing Examiner may request that a representative be appointed to receive notices and copies of documents. The appointed representative will receive copies of documents and notices for the group.

(g) Intervention

An interested person may petition the Examiner to intervene as a party. The petition shall be filed at least ten (10) working days prior to the appeal hearing and shall set forth reasons why the petitioner should be allowed to participate. The petition shall be considered at or before the beginning of the hearing and intervention shall be allowed only if the Examiner so orders, and upon such terms and conditions as the Examiner determines to be appropriate.

The parties shall have the opportunity for reply or objection. Any reply or objection must be filed at least three (3) working days prior to the appeal hearing.

(h) Withdrawal of the Appeal

The appellant may withdraw an appeal at any time prior to the close of the record.

(i) Staff Report

Where required under the Code, the Department of Development Services shall file a written staff report with the Hearing Examiner, within the timeframe prescribed by the Code, summarizing its case and making a recommendation for a remedy. A copy of this report shall be mailed simultaneously to the appellant. The staff report shall be completed pursuant to the Code.

(j) Format of Appeal Hearing

The format for an appeal hearing will be informal, yet designed in such a way that the evidence and facts relevant to the proceeding will become readily and efficiently available to the Hearing Examiner. Any appeal hearing shall include, but need not be limited to, the following elements:

- (1) A brief introductory statement by the Hearing Examiner.
- (2) Presentation by the City including any relevant testimony the City wishes to present.
- (3) Cross examination of City witnesses by the appellant, if needed.
- (4) Presentation by the appellant, including any relevant testimony the appellant wishes to present.
- (5) Cross examination of appellant witnesses by the City, if needed.
- (6) Presentation of rebuttal witnesses, if needed.
- (7) Questions by the Hearing Examiner.
- (8) Concluding remarks or summations and rebuttal thereto as necessary.

(k) Participation by Non-Party

Appeal hearings are open to the public, but testimony is generally not allowed from a person who is not a party to an appeal hearing unless called as a witness by a party. The Hearing Examiner at his or her discretion may call or allow a non-party witness to testify upon a determination that such testimony will be relevant and not repetitive.

**9. PRE-DECISION HEARING ON APPLICATIONS**

(a) Departmental Staff Report on Application

Pursuant to the Code, the involved City department(s) shall distribute a staff report to the Hearing Examiner, the applicant, and any other required parties prior to the date of the public hearing and, at the same time, copies shall be made available to the public at the City Clerk's Office.

(b) Format of Hearing

The format for a pre-decision hearing will be public and informal, but organized so that the testimony and evidence can be presented quickly and efficiently. A pre-decision hearing shall include, but need not be limited to, the following elements:

- (1) A brief introductory statement by the Hearing Examiner.
- (2) A presentation by the City, which may include reference to visual aids such as maps, and a summary of the recommendation of city staff.
- (3) Testimony by the applicant.
- (4) Testimony from interested persons.
- (5) Rebuttal by the City.
- (6) Rebuttal by the applicant.
- (6) Closing remarks, if needed.

The examiner may ask questions at any time of any party prior to close of the hearing.

(c) Content of the Record

The record of a hearing conducted by the Hearing Examiner shall include, but need not be limited to, the following:

- (1) The application.
- (2) The departmental staff reports.
- (3) All other evidence received or considered including all exhibits and other materials filed.
- (4) A recommendation or decision containing findings and conclusions including a statement of matters officially noticed by the Hearing Examiner.
- (5) Electronic recordings of the proceedings.

(6) An affidavit or certificate of written notice given of the hearing.

## **10. EVIDENCE**

### (a) Burden of Proof

(1) Where applicable ordinance(s) so provide, the Hearing Examiner shall accord deference or other presumption as directed by the applicable ordinance(s).

(2) Where the applicable ordinance(s) provide that the appellant has the burden, appellant(s) must show by the applicable standard of proof that the City's decision or action is not in compliance with ordinance(s) authorizing that decision or action.

(3) Where the applicable ordinance(s) do not provide that the appellant has the burden, the City shall make a prima facie showing that its decision or action is in compliance with the ordinance(s) authorizing that decision or action.

(4) Unless otherwise provided by applicable ordinance(s), statute, or case law, the standard of proof is a preponderance of the evidence.

### (b) Admissibility

The hearing generally will not be conducted according to technical rules relating to evidence and procedure. Any evidence that is relevant, material, and reliable may be admitted if in the Hearing Examiner's judgment it possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs.

### (c) Copies

Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

### (d) Official Notice

The Hearing Examiner may take official notice of generally accepted and recognized facts and law, including but not limited to City ordinances, resolutions, court decisions, and prior Hearing Examiner decisions. The Examiner may also take notice of technical or scientific facts generally accepted as such within the relevant scientific or technical community.

## **11. RECORDING**

All proceedings before the Hearing Examiner shall be electronically recorded including but not limited to prehearing conferences, appeal hearings, and pre-decision hearings. The recordings of hearings shall be part of the official case record.

## **12. OATH OR AFFIRMATION**

All testimony shall be taken under oath or affirmation but failure to administer the oath shall not be grounds for invalidation of the proceedings unless invalidation is required by other law.

## **13. CROSS-EXAMINATION**

Cross-examination of expert witnesses and appeal parties and witnesses shall be permitted as necessary for full disclosure of the facts and as required by law.

## **14. LIMIT ON TESTIMONY**

The Examiner may impose reasonable limitations on the number of witnesses heard, and on the nature and length of their testimony, in order to expedite the proceeding and avoid continuation of the hearing. Notice shall be given as early as practical when time limitations are to be imposed. If a party is unable to present his or her arguments and testimony within the allotted time, the record may be kept open and an opportunity may be granted to submit written materials after the close of the hearing.

## **15. MOTIONS**

Any application to the Hearing Examiner for an order shall be by motion which, unless made during a public hearing, shall be in writing. The motion shall state explicitly the reasons for the request, and shall state the specific relief or order sought.

Motions in advance of the hearing shall be received by the Hearing Examiner and all parties of record at least five (5) working days before the date of the hearing. Written replies to such a motion shall be received by the Hearing Examiner and all parties of record before the time set for the hearing.

The Hearing Examiner may issue an order based on the written motion and any replies, without oral arguments, or may call for oral arguments before ruling on the motion.

## **16. CONSOLIDATION OF HEARINGS**

When practical and consistent with ordinance requirements, the Hearing Examiner will consolidate land use matters for hearing. Any party may bring to the attention of the Hearing Examiner the need for consolidation.

## **17. SITE VIEW**

The Hearing Examiner may view a site before or after a hearing. Failure to view a site will not invalidate the Hearing Examiner's decision.

## **18. CONTINUING OR REOPENING HEARING**

(a) Prior to a scheduled hearing, the Examiner may continue the hearing for good cause as determined by the Hearing Examiner. Written notice of the new date, time, and place of the continued hearing shall be provided to each party and person(s) entitled to receive notice pursuant to the KMC. The notice of a rescheduled hearing need not observe the time requirements to which the original notice was subject.

(b) Prior to the issuance of the subject decision or recommendation, the Examiner may continue or reopen proceedings for good cause and may permit or require written briefs or oral argument as consistent with state law. If a matter is reopened after conclusion of the hearing, written notice of the date, time, and place of the reopened hearing shall be provided to each party and person(s) entitled to receive notice pursuant to the KMC. Such notice shall be provided not less than ten (10) prior to the reopened hearing

(c) If the Examiner determines at hearing that there is good cause to continue such proceeding and then and there specifies the date, time, and place of the new hearing, no further notice is required.

## **19. LEAVING THE RECORD OPEN**

(a) The Examiner may leave the record of hearing open at the conclusion of a hearing in order to receive argument, additional evidence, or for other good purpose. Parties shall be provided notice of the consideration of any evidence received after hearing and shall have an opportunity to review such evidence and to file rebuttal evidence or argument.

(b) Except as otherwise provided in these rules, , information submitted after the close of the record shall not be included in the hearing record or considered by the Examiner in making the decision or recommendation.

## **20. RECOMMENDATION OR DECISION**

The Hearing Examiner shall issue a written recommendation or decision within ten (10) working days of the closure of the record, unless the time period is extended as authorized by law or mutual agreement of the parties.

Copies of the recommendation or decision shall be mailed to all parties of record, and to any other person pursuant to the Code.

## **21. CONTENT OF RECOMMENDATION OR DECISION**

The Hearing Examiner's recommendation or decision shall contain findings of fact, conclusions based thereon, and a recommendation or decision consistent with those conclusions. In addition, the Hearing Examiner's recommendation or decision may include conditions necessary to mitigate any impacts of the proposal and a brief statement of appeal rights of the parties.

## **22. CLARIFICATION OF A DECISION OR RECOMMENDATION OF THE EXAMINER**

A party may file a written request for clarification of the decision or recommendation. Alternatively, the Hearing Examiner may issue a clarification upon his or her own motion. A clarification may not materially alter the outcome of the decision or recommendation. A request for clarification does not stop the running of the time for filing appeals, whether to the City Council or Superior Court.

The written request for clarification must be received by the City Clerk and by all parties within five (5) working days after the date of issuance of the Hearing Examiner's decision or recommendation.

The Hearing Examiner, in his or her discretion, shall determine what further action is proper, and within five (5) working days after filing of the request shall issue that determination in writing to all parties of record.

## **23. RECONSIDERATION**

(a) A party may file a written motion for reconsideration with the City Clerk within five (5) calendar days of the date of the Hearing Examiner's decision. The timely filing of a motion for reconsideration shall stay the Hearing Examiner's decision until such time as the motion has been disposed of by the Hearing Examiner. No party may file a motion to reconsider on a decision issued after reconsideration.

(b) The grounds for seeking reconsideration shall be limited to the following:

1. The Hearing Examiner engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
2. The Hearing Examiner's decision is an erroneous interpretation of the law;
3. The Hearing Examiner's findings, conclusions and/or conditions are not supported by the record;
4. The Hearing Examiner's decision is a clearly erroneous application of the law to the facts; or
5. The Hearing Examiner exceeded the Hearing Examiner's jurisdiction;

(c) The motion for reconsideration must:

1. Contain the name, mailing address and daytime telephone number of the moving party, together with the signature of the moving party;
2. Identify the specific findings, conclusions, actions and/or conditions for which reconsideration is requested;
3. State the specific grounds upon which relief is requested;
4. Describe the specific relief requested; and
5. Where applicable, identify the specific nature of any new evidence. Such new evidence shall be considered only if the additional evidence relates to: (i) the grounds for disqualification of the Hearing Examiner when such grounds were unknown by the moving party at the time the record was created; or (ii) matters that were improperly excluded from the record after being offered by a party.

(d) The Hearing Examiner shall issue a decision on the motion as follows:

1. Deny the motion in writing; or
2. Issue an amended decision; or
3. Accept the motion and set the matter for closed record review with no or limited new evidence or information allowed to be submitted and only written reconsideration arguments allowed. Any written arguments must be filed within 10 calendar days from notice of the Hearing Examiner.

## **24. TERMINATION OF JURISDICTION**

The jurisdiction of the Hearing Examiner in a matter shall terminate upon the issuance of his or her final action in that matter. The Hearing Examiner's final action is the issuance of a recommendation or decision unless a request for reconsideration or clarification is timely filed. If a request for reconsideration or clarification is timely filed, the final action of the Hearing Examiner is his or her determination on the reconsideration or clarification request.

Upon termination of the Hearing Examiner's jurisdiction, matters which require City Council action are under the jurisdiction of the City Council. The City Council may, however, revive the jurisdiction of the Hearing Examiner and remand a matter for clarification of specific issues, or to consider facts not available at the time of the original hearing. Remand hearings shall be processed in the same manner as the original proceeding before the Hearing Examiner, using the same procedures for posting, public

notice and the forwarding of the Hearing Examiner's recommendation to the City Council.

## **25. DISPOSITION OF CASE RECORD**

The official case record and other related materials shall be forwarded to the City Clerk for storage after a matter has been finally acted upon by the City Council or by the Hearing Examiner. Tape recordings of all proceedings before the Hearing Examiner shall be maintained in the City Clerk's Office for the period required by law.

Case records of matters before the Hearing Examiner are public records and available for review.

## **26. FILING**

(a) Documents shall be deemed filed with the Hearing Examiner, City Clerk and City on receipt at the Kenmore City Clerk's Office, located at 18120 68<sup>th</sup> AVE NE.

(b) Documents shall be served personally or, unless otherwise provided by applicable ordinance, by first-class, registered, or certified mail, or by facsimile (fax) transmission. Service shall be regarded as complete upon deposit in the regular facilities of the U.S. Mail of a properly stamped and addressed letter or packet, or at the time personally delivered, or transmitted by fax. On a case by case basis the Hearing Examiner may authorize service by email to specified email addresses in lieu of fax or mail.

DATED this 24<sup>th</sup> day of January, 2017.



Phil A. Olbrechts

Hearing Examiner for City of Kenmore

**Exhibit "A"**  
**SOQ SIGNATURE SHEET**

Solicitation Name: Hearing Examiner and Pro Tem Hearing Examiner

Legal Name: Phil Olbrechts

Business Name: Olbrechts and Associates, PLLC

Address: 720 N. 10<sup>th</sup> St., A #297, Renton, WA 98057

Unified Business Identifier (UBI) No.: 6030601020010001

M/W/DBE Certification No. (If Applicable): \_\_\_\_\_

**For questions regarding this Statement of Qualifications, the City RFQ Coordinator should contact the following individual:**

Name: Phil Olbrechts

Telephone No.: 206-650-7268

Email Address: olbrechtslaw@gmail.com

**Signature of Authorized Official**

The Consultant is hereby advised that by signature of this Statement of Qualifications, they are deemed to have acknowledged all requirements and signed all certificates contained herein.

Signature: Phil Olbrechts

Name of Person Signing: Phil Olbrechts

Title: Managing Member

Date: January 30, 2026

Email Address: olbrechtslaw@gmail.com

**Exhibit "B"**  
**STATEMENT OF COMPLIANCE WITH NONDISCRIMINATION REQUIREMENT  
AND  
EQUAL BENEFITS DECLARATION**

The Olympia City Council mandates compliance with the City's *Nondiscrimination in Delivery of City Services or Resources* ordinance (OMC 1.24) and *Employee Benefits* ordinance (OMC 3.18) for all services provided by City employees or through contracts with other entities. All contract agencies or vendors and their employees must understand and fully carry out the City's nondiscrimination policy. Accordingly, each City agreement or contract for services contains language that requires an agency or vendor to agree that it shall not unlawfully discriminate against an employee or client based on any legally protected status. This includes but is not limited to: race, creed, religion, color, national origin, age, sex, marital status, veteran status, sexual orientation, gender identity, genetic information, or the presence of any disability and any other status protected from discrimination by state or federal law. Unlawful discrimination includes transphobic discrimination or harassment, including transgender exclusion policies or practices in employee benefits.

Listed below are methods to ensure that this policy is communicated to your employees, if applicable.

- Nondiscrimination provisions are posted on printed material with broad distribution (newsletters, brochures, etc.).
- Nondiscrimination provisions are posted on applications for service.
- Nondiscrimination provisions are posted on the agency's web site.
- Nondiscrimination provisions are included in human resource materials provided to job applicants and new employees.
- Nondiscrimination provisions are shared during meetings.

**Failure to implement at least two of the measures specified above or to comply with the City of Olympia's nondiscrimination ordinance constitutes a breach of contract.**

By signing this statement, I acknowledge compliance with the City of Olympia's Nondiscrimination ordinance by the use of at least two of the measures specified above.

If this contract is valued at \$50,000 or more, I affirm that Consultant listed below complies with the City of Olympia Equal Benefits Ordinance (OMC 3.18) and shall, prior to contracting with the City, have policies in place prohibiting discrimination in the provision of employee benefits.

Should I operate as a sole proprietor, I agree not to discriminate against any client, or any future employees, based on any status protected from discrimination by state or federal law.

Phil Olbrechts  
Signature

Phil Olbrechts  
Printed Name of Signatory

January 30, 2026  
Date

Olbrechts and Associates, PLLC  
Consultant Name